TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 342

MADISON L. MILLER, JR., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE MACON DIVISION OF THE MIDDLE DISTRICT OF GEORGIA

At. Law. No. —

MADISON L. MILLER, JR., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed April 5, 1932

To the District Court of the United States for the Macon Division of the Middle District of Georgia:

The petition of Madison L. Miller, Jr., respectfully shows:

1

Plaintiff is a resident of Macon, Bibb County, Georgia, and within the jurisdiction of the United States Court for the Macon Division of the Middle District of Georgia.

2

This suit is brought against the United States of America under the laws of the United States, and particularly arising under the World War Veterans Relief Laws of the United States, and is a suit for the recovery of total and permanent disability benefits under yearly renewable term insurance issued to plaintiff through the Bureau of War Risk Insurance while enlisted in the United States Army.

3

Plaintiff enlisted in the United States Army June 5, 1917, and was honorably discharged from the United States Army on April 3, 1919.

4

Plaintiff at the time of his injuries hereinafter described had with the United States a contract of yearly renewable

term insurance in the amount of $10,000.00 under which he [fol. 2] was entitled to $57.50 per month in the event of total and permanent disability.

5

Plaintiff shows that on October 26, 1918, while in the performance of his duties as a soldier in the United States Army, he was seriously injured in France, while moving up to the front with troops to take his position in the front line operations. As a result of this injury his right arm was badly mangled, which required immediate amputation, and the left side of his face was badly injured, which for all practical purposes destroyed the sight of his left eye.

6

Plaintiff shows that at the time of his discharge he was totally and permanently disabled, due to the fact that he had lost his right arm at the shoulder and had lost the sight of his left eye, and that said disability has continued until this day and will continue. Plaintiff shows that while he can see the outline of a large object with his left eye, that this is the extent of its usefulness, and that he is advised by specialists that there is nothing he can do to correct the vision of his left eye, and that for all practical purposes the sight in that eye is permanently gone.

7

Plaintiff shows that he regularly paid the premiums on the yearly renewable term insurance contract issued to him by the United States Government through the Bureau of War Risk Insurance until the date of his discharge; and that at the time of his discharge said insurance was in full force and effect.

8

Plaintiff shows that said insurance was in full force and [fol. 3] effect at the time he became totally and permanently disabled, and that the United States is indebted to him on said contract of insurance in the sum of $57.50 per month from October 26, 1918, to date.

9

Plaintiff shows that on June 5, 1931, he filed with the Veterans Administration his claim for total and permanent

disability benefits under his contract of yearly renewable term insurance, and that said claim was considered by the Veterans Administration, and on April 1, 1932, said claim was denied by the Administrator or Director of Veterans Affairs, whereby disagreement has arisen under said contract of insurance between the Bureau and plaintiff.

10

Plaintiff shows that he has been totally and permanently disabled for a period of 161 months from the date of his injury, and that his total and permanent disability benefits under said contract of insurance amount to $9,257.50 to March 26, 1932.

11

Plaintiff shows that his disability is of such character that it will continue for the remainder of his life, and he is entitled to $57.50 per month as long as his total and permanent disability shall continue.

12

Plaintiff shows that the United States of America by reason of the foregoing facts is indebted to him in the sum of $9,257.50, as of March 26, 1932, and will continue indebted to him at the rate of $57.50 per month.

Wherefore, Plaintiff prays, under the law and the facts, that he do have and recover a judgment against the United States of America in the principal amount of $9,257.50 for total and permanent disability benefits, to which he is en- [fol. 4] titled under said contract of yearly renewable term insurance, up to March 26, 1932, and a further judgment for $57.50 per month as long as he shall continue totally and permanently disabled under the terms and within the meaning of the laws of the United States granting to him War Risk Insurance.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Of Counsel: Jas. A. Lowrey, Jr., Wallace Miller, P. O. Address: Monica Court, Macon, Ga.

Duly sworn to by Madison L. Miller, Jr. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

The President of the United States to the Marshal of the Middle District of Georgia, Greeting:

The defendant, United States of America, is hereby required, personally or by Attorney, to be and appear at the *next term of* said Court to be held in the City of Macon, Ga., on first Monday in November next, then and there to answer the Plaintiff in an action of complaint, as in default thereof, the said Court will proceed as to justice shall appertain.

Witness, the Honorable Bascom S. Deaver, Judge of the District Court of the United States at Macon, Ga., in said District, this 5th day of April, in the year of our Lord, one thousand nine hundred and thirty-two.

Milton K. Wallace, Deputy Clerk. Miller & Lowrey, Plaintiff's Attorney.

Service of the foregoing petition acknowledged, copy received.

This April 6th, 1932.

Fred W. New, Asst. U. S. Attorney.

[fol. 6] IN UNITED STATESS DISTRICT COURT

[Title omitted]

ANSWER—Filed June 2, 1932

Comes now the defendant and answering plaintiff's petition says:

1

Defendant is without sufficient information either to admit or deny the allegations contained in paragraph one and therefore denies the same.

2

Defendant denies paragraph two.

3

Defendant denies paragraph three.

4

Defendant denies paragraph four.

5

Defendant denies paragraph five.

6

Defendant denies paragraph six.

7

Defendant denies paragraph seven.

8

Defendant denies paragraph eight.

9

Defendant denies paragraph nine.

10

Defendant denies paragraph ten.

11

Defendant denies paragraph eleven.

12

Defendant denies paragraph twelve.

[fol. 7] Wherefore, having fully answered, this defendant prays that it be hence discharged.

Fred W. New. W. A. Bootle, United States Attorney, Attorney for Defendant.

Duly sworn to by Fred W. New. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER—Filed Nov. 16, 1932

Comes now the defendant in the above stated case, and with leave of the Court first had and obtained, amends its answer heretofore filed by striking from said answer paragraphs One, Two, Three, Four, Seven and Nine, and by substituting in lieu of said stricken paragraphs the following paragraphs bearing the same numbers, respectively:

1

Paragraph One is admitted.

2

Paragraph Two is admitted.

3

Defendant admits Paragraph Three except that defendant alleges that the date of the enlistment was June 7, 1917, instead of the date alleged.

4

Defendant denies Paragraph Four as pleaded, but admits that during the period of plaintiff's enlistment and on or about January 22, 1918, there was issued to the plaintiff a certificate of War Risk Insurance in the amount of Ten Thousand ($10,000.00) Dollars, under which the plaintiff would have been entitled to receive from the defendant Fifty-seven Dollars and Fifty Cents ($57.50) per month in the event plaintiff had become totally and permanently disabled during the life of said certificate of insurance.

[fol. 9] 7

Paragraph Seven is admitted.

9

Paragraph Nine is admitted.

Wherefore, defendant prays that this amendment be allowed and ordered filed.

W. A. Bootle, United States Attorney, Attorney for Defendant.

The foregoing amendment allowed and ordered filed.
This 16 day of November, 1932.

Bascom S. Deaver, United States Judge.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

VERDICT

We, the jury, find for the defendant.
This July 10th, 1933.

J. C. Hood, Foreman.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed July 12, 1933

Whereupon, it is ordered, considered and adjudged that the defendant, the United States of America, have and recover of the plaintiff, Madison L. Miller, Jr., the costs of said action, to be taxed by the Clerk of this Court.
This 10th day of July, 1933.

Bascom S. Deaver, United States Judge. A. Edward Smith, Assistant United States Attorney, Attorney for Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN FORMA PAUPERIS—Filed July 29, 1933

To the Honorable District Court of the United States for the Macon Division of the Middle District of Georgia:

Madison L. Miller, Jr., the plaintiff in the above stated case, brings this petition as permitted by the provisions

of Sect. 832 of Title 28, U. S. C. A., and respectfully shows to the Court the following facts:

1

Petitioner is a citizen of the United States, residing in the City of Macon, Bibb County, Georgia, within the Macon Division of the Middle District of Georgia.

2

Petitioner enlisted in the United States Army June 5, 1917, and was honorably discharged on April 3, 1919.

3

On October 26, 1918, while in the performance of his duties as a soldier in the United States Army, petitioner was totally and permanently disabled as a result of injuries sustained in the wreck of a troop train.

4

In March of 1932 petitioner filed a suit against the United States Government, to the regular May 1, 1932, Term of this Court, in which he sought to recover disability benefits under the provisions of the War Risk insurance contract issued to him by the United States, which said contract was in full force and effect at the time petitioner became totally and permanently disabled.

[fol. 12] 5

Petitioner's said suit came on regularly to be tried in the District Court of the United States for said division and district on the 10th day of July, 1933, before his Honor Bascom S. Deaver, judge presiding, and a jury.

6

Under the pleadings in the case the only issue to be decided was whether or not petitioner was totally and permanently disabled prior to May 31, 1919.

7

The evidence submitted by petitioner showed that prior to May 31, 1919, petitioner's right arm had been amputated above the elbow and petitioner had lost the sight of

his left eye for all practical purposes, having therein only one-tenth of normal vision; that petitioner was otherwise in good health.

8

Petitioner offered evidence showing that he had sought employment continuously from the time of his discharge from the Army; but on account of the loss of his right arm and left eye, had not been able to follow any substantially gainful occupation, but, as a matter of fact, had only been able during said period of fourteen years to earn the total sum of $405.

9

When petitioner rested his case the United States made a motion for a directed verdict in its behalf, on the ground that the evidence offered by petitioner in support of his petition for disability benefits was insufficient to show that petitioner was totally and permanently disabled as alleged in said petition.

10

After argument the Court sustained the Government's motion and directed the jury to return a verdict for the [fol. 13] United States.

11

Petitioner then and there excepted to the judgment of the Court directing the verdict in behalf of the Government, and now desires to prosecute an appeal from said judgment to the Circuit Court of Appeals for the Fifth Circuit.

12

Petitioner believes that the judgment of the trial court in directing a verdict for the Government in his case is erroneous, and that petitioner is entitled to the disability benefits for which he brought suit, and is entitled to carry his case to the Circuit Court of Appeals for the Fifth Circuit in order that said judgment of the trial court may be reviewed and corrected.

13

Petiotner shows that while in the past he has drawn compensation from the United States Government, he was recently advised by the Veterans' Bureau that the laws

under which compensation had theretofore been paid to him had been repealed, and that until his case could be reviewed by the Bureau he would receive no further compensation.

14

Petitioner shows that he has no property and because of his poverty he is without and cannot obtain the money with which to pay the costs of the appeal which he desires to prosecute as aforesaid or to give security for the same. There is no other person interested in said suit except petitioner.

15

Petitioner shows that Sect. 832, Title 28, U. S. C. A., provides that he may prosecute an appeal to the Circuit Court of Appeals or the Supreme Court, including all ap- [fol. 14] pellate proceedings, without being required to prepay fees or costs or paying for printing the record in the appellate court, or giving security therefor, unless the trial court shall certify in writing that in the opinion of the court such proposed appeal is not taken in good faith.

Wherefore, Petitioner prays that he be permitted by order of the Court to prosecute his said appeal as provided in said Sect. 832, Title 28, U. S. C. A.

Madison L. Miller, Jr., Petitioner.

Sworn to and subscribed before me this 11th day of July, 1933. Margaret Haverfield, Notary Public, State of Ga. at Large. (Notary Seal.)

ORDER

The foregoing duly verified petition read, considered and ordered filed.

It is ordered that the petitioner, Madison L. Miller, Jr., be allowed to take an appeal from the Judgment complained of in said petition to the Circuit Court of Appeals for the Fifth Circuit without being required to prepay any fees or court costs or for the printing of the record in the appellate court, or to give security therefor.

So ordered in open court this 12th day of July, 1933.

Bascom S. Deaver, U. S. Judge.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

At Law. No. 325

MADISON L. MILLER, JR., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Bill of Exceptions—Filed July 29, 1933

Be it remembered that at the May Term of said Court, on July 10, 1933, the Honorable Bascom S. Deaver, judge of said Court presiding, the above entitled case came on to be heard, the same being a suit by Madison L. Miller, Jr., against the United States of America on a contract of yearly renewable term insurance issued to the said Madison L. Miller, Jr., through the Bureau of War Risk Insurance while he was enlisted in the United States Army, for total and permanent disability benefits from October 26, 1918, at the rate of $57.50 per month.

It was alleged in the petition and admitted in the answer that a certificate of War Risk insurance in the amount of $10,000 was issued to plaintiff on or about January 22, 1918; that said contract of insurance provided total and permanent disability benefits of $57.50 per month for 240 months, in the event of total and permanent disability; that the premiums on this insurance were paid through April, 1919, continuing the insurance in force to May 31, 1919; that claim for total and permanent disability benefits under said renewable term insurance contract had been filed with the Veterans Administration and denied; and that a disagreement had arisen under said contract of insurance between the Bureau or Veterans Administration and plaintiff. So that the only issue to be tried was whether or not the [fol. 16] plaintiff became totally and permanently disabled within the terms of the War Risk Insurance certificate and the meaning of the War Risk Insurance Act of 1917 and Acts amendatory thereof prior to May 31, 1919.

Upon said hearing or trial the following proceedings were had, to-wit:

A jury was impaneled and sworn according to law.

Counsel for defendant stated in open court that the United States concedes that the injuries of plaintiff are permanent but contends that his injuries are not total within the terms and meaning of the contract and the law.

Thereupon, plaintiff, to sustain the issue, introduced the following evidence:

"MADISON L. MILLER, JR., being sworn, testified:

"I enlisted in the United States Army June 7, 1917; I volunteered. I went to France with the 138th Field Artillery. I was in that regiment at the time I was injured. At the time I was injured I was on a troop train going up to the front, as I thought; I am not certain just where the train was headed for. The train I was on was in a wreck. At the time I was asleep, and the first thing I knew was I heard a big commotion, then I went sailing through the air. Something hit me, and I didn't know anything after that until after they had laid me out by a fire. This occurred on October 26, 1918, at night.

"In this wreck I had my right hand badly mangled and my face and head badly bruised. I received a cut on my forehead and it left this blue scar. The next day they took me to a hospital, and once when the doctor came in to see me he looked very hazy to me, and he told me that my arm would have to come off. They took the arm off the next day, above the elbow. After I came out from under the [fol. 17] ether and was lying there in the bed I tested my eyes. I looked at a clock on the wall about twenty feet away and found that I could see the clock with my right eye but could not tell the time with my left eye; all I could see with my left eye was the hazy outline of the clock. This was the first time I discovered anything wrong with my left eye. A day or so later they had to operate on my arm again and take off another piece of bone so as to let the flesh come down over the end of the bone.

"I was discharged April 3, 1919, from the Walter Reed General Hospital, Takoma Park, District of Columbia.

"My left eye is in the same condition now that it was when I was in the hospital in France in 1918. All I can see out of it now is the outline of big objects.

"Before I entered the Army I was working for the City of Louisville. I was a practical engineer. I first was a rodman, then I operated a surveying instrument. I could

not do this work after I lost my arm; I could not operate the instrument. I am not a graduate engineer. As a boy I went about as high as the third grade of high school. This included one year at Staunton Military School. I went there only one year.

"When I was discharged from the Army I returned to my father's house in Louisville, Kentucky, and lived there with him for some months. About June or July, 1919, I got a job at Camp Taylor, Louisville, Kentucky, as hazard inspector. This job at Camp Taylor was created for me out of sympathy. I considered it a gratuity. It only lasted one month.

"The next job I got was along about the Fall of 1919. I went out to C. V. Visman's packing house in response to notice I had that they wanted men out there. When I got out there they told me they wanted men to lift heavy quarters of meat, and they saw at once that I could not do this [fol. 18] work, having only one arm. So they said they would try to fix me up a job in the office. They gave me a job taking orders, but as I had had only one hand I could not hold the receiver of the 'phone and write down the orders at the same time. Too, I was right-handed before my injury, and could not write very well with my left hand. They saw after a few days that I could not do the work, but told me to stay on a little while longer. However, after three weeks they told me they didn't need me and let me go. I received $25 a week for the time I worked for C. V. Visman & Company.

"The next job I had was with Otis Hidden & Company, a wholesale house at Louisville, Kentucky. They first put me to handling bolts and heavy ironware. Due to the fact that I had only one hand, I was very slow and awkward with this work, and they soon found that I could not do it satisfactorily. So they transferred me to the rug department. In this department they wanted me to take down big rolled-up rugs about fifty feet wide, unroll them, measure them, roll them back up, and stand them back up against the wall. Of course, I could not do this, having only one hand. So I only stayed there a few days. My agreement with these people was that I was to be paid whatever they thought I was worth. Of course, I was not worth anything to them, and they did not pay me anything. This was at Christmas time and they gave me a $10 Christmas bonus; that was all I got from them.

"The next job I got was with the Kokomo Rubber Company. I was to work as a salesman on the road, but I never got on the road. I stayed around the office for a while and they gave me a sample case and tried me out in the city. I had a lot of sections of tires and rubber goods that I was supposed to take around and demonstrate, but, having only one hand, I could not demonstrate these rubber goods; so I sold no rubber goods. I did not get any pay [fol. 19] from this company.

"The next job I tried was with the H. W. Dubiski Company. They were engaged in the business of selling stocks. I worked with this company about twenty-two months, on a commission basis. I was to receive 10%. During this time I made $105. I just could not sell the stock.

"The only other job I had was in 1931 when I came to Macon and tried to sell goods for the Fuller Brush Company. I worked at this from January, 1931, until May, 1931, and sold only $50 worth of goods and made a commission of $20. The reason I failed on these sales jobs is I just did not have any talent for it. For one to be a salesman he has to have a talent for it. You know, some people just can't sell. I tried but I could not sell.

"During the intervals between these jobs I was diligent in my efforts to get employment, but I could not get any because people did not want to employ a one-armed man with one eye when they could get men with two good arms and two good eyes.

"The Government sent me to Cleveland to take an advertising course. I got up there and my health got bad, so I did not finish the course but went back home.

"My father had a little farm of sixty-four acres. He rented out part of this. I did not manage the farm for my father. I knew very little about his business. After my father died, my brother and I subdivided this farm into lots and sold off the lots. The part I got from the sale of these lots was about $2500.

"When I wrote the Government in 1919 that my physical condition was good other than the loss of my right arm above the elbow, I had in mind my general health. I was not suffering from any pain or disease. When I answered the question in my application for life insurance about my eyes, I saw no reason why I should tell them about my [fol. 20] left eye, as the eye was not diseased and I did not

see that this had anything to do with the life insurance or would affect me as a risk for life insurance.

"I have received an average of $90.00 a month from the Government as compensation since my discharge, but have earned by my own efforts only $405 since April, 1919.

DR C. L. PENNINGTON, sworn for plaintiff, testified:

"I am an eye specialist; I have been practicing my profession eighteen years at Macon.

"I examined Madison L. Miller's eyes in September, 1932. He has one-tenth vision in the left eye. This was caused from non-use. His eye condition cannot be corrected now. It could have been corrected if he had been fitted with proper glasses when he was five or six years old. His eye has been defective since birth. The shape of the lens is defective; it is flattened out so that it does not focus. He has no use of the left eye. Of course, the eye is better than no eye at all, for in case he should lose the right eye he could see enough out of the left eye to get around the streets; that is, he could follow the outline of large objects. It is my opinion that his eye was in the same condition in 1918 as it was when I examined it in 1932—only one-tenth vision. The fact that he could only see the outline of a large object, like a clock, twenty feet away in 1918, would indicate that his eye was in as bad condition then as it is now.

"I would say that with the loss of his right arm and his left eye he was totally disabled. You see, having lost an arm on the right side and an eye on the left side, he is much more seriously handicapped than if he had lost his eye and arm on the same side, as he can only use his left arm and hand and has to turn and look at an angle with his right eye and direct the work of his left hand, which makes his handicap much more serious—I would say 50% or 75% [fol. 21] more serious than if he had lost his right eye and had a good left eye on the same side with his left hand.

"I do not know of any gainful occupation that he could follow. He could manage a farm if he knew the farming business, but there are not many fellows with two good hands and two good eyes making anything at farming in

recent years. I don't know about operating an elevator. If he had to operate the elevator and open the doors, he could not do that with just one hand.

"If he lost the sight of his good eye, he could still see enough out of his left eye to get around. One-tenth vision is much less disabling than total blindness.

HAROLD L. STUCKER and A. J. BARTHOLOMEW testified by deposition:

"That they were in the 138th Field Artillery with Madison L. Miller, Jr., and that they saw him at the time of the wreck; that they were on the same troop train that Miller was on that was wrecked in France; that they saw him just after this wreck which occurred in October, 1918; that his right arm and hand were badly mangled; that he received cuts and bruises around the face; that there appeared to be one severe cut about the center of his forehead that left a blue scar, that is there now."

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Upon the conclusion of plaintiff's evidence, counsel for the United States, the defendant herein, moved the Court to direct a verdict for defendant upon the following grounds:

"1. That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.

"2. Because it affirmatively appears from the plaintiff's evidence that the eye disability of the insured existed prior [fol. 22] to the issuance of the war risk insurance contract sued upon, and because the remaining disability, to-wit, the loss of an arm, as a matter of law is not a total disability."

The trial judge, after hearing argument on said motion, announced that he would overrule that ground of the motion for a directed verdict urged by Government's counsel based on plaintiff's evidence that the loss of vision in his

left eye ante-dated the issuance to him of the War Risk insurance contract sued upon. The trial judge said that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and that he would direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. Thereupon the Court directed the jury to return a verdict for the defendant, to which said order or ruling of the Court directing a verdict for the defendant, plaintiff then and there excepted, which exception was duly allowed, and now excepts and assigns the same as error.

VERDICT

Pursuant to said order or ruling of the Court directing a verdict for the defendant, the jury returned a verdict for defendant.

Upon the verdict returned at the Court's direction, the Court entered the following judgment:

JUDGMENT

Whereupon, it is ordered, considered and adjudged that the defendant, the United States of America, have and recover of the plaintiff, Madison L. Miller, Jr., the costs of said action, to be taxed by the Clerk of this Court.

"This 10th day of July, 1933.

"Bascom S. Deaver, United States Judge."

[fol. 23] To which judgment plaintiff then and there excepted, which exception was duly allowed, and now excepts and assigns the same as error.

And now, within the time allowed by law, and at the May Term of said Court, during which said judgment was entered, and in furtherance of justice and that right may be done, the plaintiff, Madison L. Miller, Jr., tenders and presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Court and made a part of the record as provided by law.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff.

Due and legal service of the foregoing bill of exceptions acknowledged; copy received, and all other and further service waived. Lodgment in the Clerk's office and notice of application to the Court for approval is hereby waived.

A. Edward Smith, Asst. U. S. Attorney, Attorney for United States of America.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing bill of exceptions was presented within the time allowed by law and is approved, allowed and settled as a correct and complete bill of exceptions, and is certified to contain all the evidence and all the rulings and instructions of the Court necessary to a clear understanding of the errors complained of, and is made a part of the record herein.

This 29 day of July, 1933.

Bascom S. Deaver, U. S. District Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 29, 1933

To the Honorable Bascom S. Deaver, District Judge of the United States Court for the Middle District of Georgia:

Comes now Madison L. Miller, Jr., the plaintiff in the above entitled case, and feeling ag-rieved by the verdict and judgment rendered therein on the 10th day of July, 1933, which judgment was filed on July 12, 1933, does hereby appeal from said judgment to the Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the assignment of errors filed herewith; and he, having heretofore filed in said court a statement under oath as to his poverty and procured an order of the court thereon

allowing him to take an appeal in forma pauperis, prays that his appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such court in such cases made and provided for appeals in forma pauperis.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Wallace Miller, Jas. A. Lowrey, Jr., of Counsel.

[fol. 25] ORDER ALLOWING APPEAL

The foregoing appeal is hereby granted and allowed, and the appellant, Madison L. Miller, Jr., is relieved of the prepayment of fees or costs or for the printing of the record in the appellate court, or giving security therefor.

This 29 day of July, 1933.

Bascom S. Deaver, U. S. Judge.

Due and legal service of the foregoing petition for appeal and order thereon acknowledged; copy received and all further service waived.

A. Edward Smith, Assistant U. S. Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 29, 1933

Comes now the Plaintiff, Madison L. Miller, Jr., in the above entitled case, and in connection with his petition for appeal files the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above entitled case, and which it appears were committed by the Court in the trial of said case.

1

The Court erred in directing the jury to return a verdict for the Government, because the plaintiff's evidence raised an issue of fact for the jury to determine.

2

The Court erred in directing the jury to return a verdict for the Government, because it was for the jury to determine whether the plaintiff produced substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.

3

The Court erred in, on its own motion, directing the jury to return a verdict for the Government, on the ground that an insured who had lost the sight of his left eye and the use of his right arm, but was otherwise in good health, is, as a matter of law, not totally and permanently disabled.

4

The Court erred in entering up a judgment for the defendant on the jury's verdict so directed.

[fol. 27] 5

The Court erred in directing a verdict for the Government, because if the issue of total and permanent disability of the insured under the War Risk contract should be determined as a matter of law and not as a matter of fact, an insured under a War Risk contract who has lost the sight of his left eye and the use of his right arm, is, as a matter of law, totally and permanently disabled within the meaning of the contract of insurance.

Wherefore, Plaintiff prays that the judgment of the District Court of the United States for the Middle District of Georgia in this case entered be reversed, and the said District Court be directed to grant a new trial of said case.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Wallace Miller, Jas. A. Lowrey, Jr., of Counsel.

Due and legal service of the foregoing assignment of errors acknowledged, copy received, and all other and further service waived.

This 29 day of July, 1933.

A. Edward Smith, Asst. U. S. Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 28] Citation in usual form, showing service on A. Edward Smith, filed July 29, 1933, omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR THE RECORD—Filed July 29, 1933

To the Clerk of the United States District Court, Middle District of Georgia:

You are hereby requested to make a transcript of the record, to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal entered in said cause, and to include in such transcript of record the following parts of the record, to-wit:

(1) The petition of Madison L. Miller, Jr.

(2) The answer of the United States of America.

(3) Amendment to the answer of the United States filed November 16th, 1932.

(4) Verdict of the jury dated July 10, 1933.

(5) Judgment of the Court dated July 10, 1933.

(6) Plaintiff's affidavit of inability to prepay costs of the appeal or give security because of his poverty, with order thereon, dated July 12, 1933.

(7) Bill of exceptions and order approving and acknowledgment of service thereon.

(8) Petition for appeal, with order allowing the same and acknowledgment thereon.

(9) Assignment of errors and acknowledgment thereon.

(10) Citation and acknowledgment of service thereon.
(11) This præcipe, with acknowledgment thereon.

F. L. Clements, Miller & Lowrey, Attorneys for Madison L. Miller, Jr.

[fol. 30] Due and legal service of the foregoing præcipe acknowledged; copy received, and all other and further notice waived.

This 29 day of July, 1933.

A. Edward Smith, Asst. U. S. Attorney.

[File endorsement omitted.]

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] Minute entry of argument and submission, May 2, 1934, omitted in printing.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7077

MADISON L. MILLER, JR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Middle District of Georgia

Before Bryan, Foster and Sibley, Circuit Judges

OPINION OF THE COURT—Filed June 8, 1934

SIBLEY, Circuit Judge:

On April 12, 1932, Madison L. Miller, Jr., sued on his policy of War Risk Insurance which was issued him July

22nd, 1918, but on which no premiums had been paid since his discharge from the army on April 3rd, 1919, his claim being that he became totally and permanently disabled in a [fol. 34] railroad accident in France on Oct. 26th, 1918. The evidence is scant, but shows that on the date last stated his right arm was mangled and had to be amputated above the elbow, and that while recovering in the hospital he discovered that with his left eye he could distinguish only the outlines of large objects. The vision in that eye is stated to be only ten percent of normal. His medical witness, however, testifies that the defect of the left eye was congenital, stationary and permanent, and existed before the accident. Miller's health except for his eye and arm deficiency was and is good. He had education through third year of High School, and before entering the army did practical land surveying. Since his discharge he has drawn on an average $90.00 per month as compensation. He cannot, with one arm, do surveying as before. He has tried other work, including salesmanship, but could not hold his jobs and had earned less than $500.00 up to the time of filing his claim for insurance on June 5th, 1931. He gives no reason why he had not made claim sooner. His medical witness stated that Miller is under a special handicap because he has to direct his left hand with his right eye, and expressed the opinion that he is totally disabled. He was right-handed originally. The Court directed a verdict for the United States over Miller's contentions, repeated on this appeal, that he was since Oct. 26th, 1918, totally and permanently disabled in law because he had lost the use of an eye and an arm; and if not, that the jury could conclude he was thus disabled in fact.

The claim of total and permanent disability as a matter of law is based partly on the provision of 38 U. S. C. A. § 473, taken from Section 202 of the War Veterans Act of 1924, 43 Stats. 618 as amended March 4th, 1925, 43 Stats. 1306, as follows: "If and while the disability is rated as total and permanent, the rate of compensation shall be [fol. 35] $100.00 per month; provided, however, that the permanent loss of the use of both feet or both hands or of both eyes or * * * of one hand and one eye * * * shall be deemed total and permanent disability * * *. For double total permanent disability the rate of compen-

sation shall be $200.00 per month"; and partly on Regulation 3140, of the Veterans Administration, promulgated March 24th, 1932, which applies the above enumeration of total permanent disabilities to yearly renewable term insurances. The history of the matter is this. The War Risk Insurance Act of 1917 provided in separate Articles for compensation for death or disability contracted in the line of duty, and for insurance against death or total permanent disability. Total permanent disability was not defined by the Act. On March 9th, 1918, it was ruled both as to compensation and insurance that any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability, and that the disability shall be deemed permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering it. T. D. 20 W. R. The courts generally accepted this as a correct definition of the total permanent disability insured against, but it was said in Lumbra vs. United States, 290 U. S. at p. 559, not to be an exact definition of total permanent disability or the sole guide by which that expression is to be construed in term insurances. The Act of December 24th, 1919, 41 Stats. 373, amended Sec. 302 of the War Risk Insurance Act of 1917 touching compensation to provide that stated losses of limbs and eyes should be deemed total permanent disability, and the War Veterans Act of 1924 somewhat altered the provisions to read as above quoted. The Bureau meanwhile on Sept. 12, 1921, had made Regulation 4 providing that for compensation [fol. 36] purposes a disability shall be rated as total and permanent when the conditions enumerated in the statute existed, and that for renewable term insurance purposes, and for automatic insurance purposes awards may be made in accordance with the same provisions. The Veterans Administration by its Regulation 3140 made the statutory instances of total permanent disability for compensation purposes mandatorily applicable to term insurance. The regulatory paragraph No. 1115, effective March 2nd, 1931, reads: "A rating of permanent and total disability for insurance purposes will have no effect on compensation and vice versa." We are of opinion that the separation of awards for insurance from those for compensation indi-

cated in this last quoted Regulation is the true interpretation of the statutes. The power to make regulations not inconsistent with the War Risk Insurance Act to carry out its purposes, and to determine upon and publish the full and exact terms and conditions of the contract of insurance which was vested in the Director of the Veterans Bureau subject to the general direction of the Secretary of the Treasury by the Acts of 1917 and 1924 did not extend to making the insurance contract cover more than the death and total permanent disability named in the statute authorizing it. The Administrator of Veterans Affairs under Section 2 of the Consolidating Act, 46 Stats., p. 1016, was given no greater power in this regard than the Director previously had. Regulation 3140, if sustained, would cause an insurance policy to mature, not upon total permanent disability, but upon a one-eyed man's losing his leg, or a one-armed man losing an eye, or the like, regardless of the effect of the loss on his earning capacity. Conceivably such a one might still be able to carry on even his former trade or calling. We do not think the Regulation binding on the courts as a modification or enlargement of the insurance contract. The statutory provision on which it appears to [fol. 37] have been based has no application to War Risk Insurance. It was an amendment of a section in Art. III of the Act of 1917 relating to compensation for disabilities contracted in the line of duty, and reappears in Part II of the Veterans Act of 1924 devoted to that subject. Separate parts of both statutes are devoted to the contract of insurance, where the disability insured against may arise at any time or from any source. The statutory provision refers also to "double total permanent disability" for compensation purposes, whereas there could be no such thing for insurance purposes. Things that Congress has directed shall be deemed total permanent disability as respects the compensation benefits voluntarily bestowed by the Government do not fix the Government's legal liability on its insurance contracts.

Regulations aside, the evidence did not warrant a finding of total permanent disability. The phrase is to be construed reasonably, and having regard to the circumstances of each case, without fixed rules or formulae uniformly governing the construction. Lumbra vs. United States, 290 U. S. 551, 558. Such disability as Miller had because of

his defective eye and the loss of his right hand was permanent, but it was not total. He was without pain or sickness. He had one good eye and the other was of some use. He had never noticed any eye lack, although he had it always, until he experimented in the hospital. It had never handicapped him. The loss of his right hand and forearm was certainly a severe blow to efficiency, but the loss of use of one arm or one leg has never been considered in itself total disability in War Risk Insurance. United States vs. Weeks, 62 Fed. (2d) 1030; United States vs. Thomas, 53 Fed. (2d) 192; United States vs. Mayfield, 64 Fed. (2d) 214; United States vs. Lacy, 64 Fed. (2d) 653; Thompson vs. United States, 65 Fed. (2d) 897; United States vs. Harris, 66 Fed. (2d) 71. We so held in reference to a com- [fol. 38] mercial policy of insurance in Metropolitan Life Ins. Co. vs. Foster, 67 Fed. (2d) 264. Of the many light occupations which it is common knowledge that a one-armed man of high school education may follow, few would require better eye-sight than the surveying that Miller used to do. In spite of his intelligence and the fixed, evident character of his disability, canvassed promptly in seeking compensation, he seems never to have considered it total so as to enable him to claim the insurance. The limitation period of the Act of May 29th, 1928, elapsed, and the extension made by the Act of July 3rd, 1930, was almost gone before his belated claim was filed. Against this situation his failure to find and hold jobs does not prevail. His policy did not cover unemployment, but only disability which prevented him from following continuously any substantially gainful employment. Having no dependents, and $90.00 a month compensation, he was under no necessity to work. Neither do we think the opinion of his physician that he was totally disabled of any weight. That was the ultimate question to be settled by the trial, and a witness ought not to have been allowed to attempt to decide it. United States vs. Sauls, 65 Fed. (2d) 886; United States vs. Bass, 64 Fed. (2d) 467. But he put his opinion solely on the fact of the deficient left eye and the lost right arm, which by themselves under all the circumstances we do not think proved total disability. See United States vs. Owen, — (Fed. (2d) —; United States vs. Hill, 62 Fed. (2d) 1022. Taking into consideration the admitted good health, education and experience of Miller, and his own

conduct with reference to his insurance, we are of opin-
[fol. 39] ion that the jury could not rightly have concluded that he was entitled to recover.

Judgment affirmed.

[fol. 40] In United States Circuit Court of Appeals

No. 7077

Madison L. Miller, Jr.,

versus

United States of America

Judgment—June 8, 1934

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 38,970. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 342. Madison L. Miller, Jr., Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed September 4, 1934. File No. 342, O. T., 1934.

Supreme Court of the United States

Order Allowing Certiorari—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 342

MADISON L. MILLER, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 342

MADISON L. MILLER, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Madison L. Miller, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of Madison L. Miller, Jr., Appellant, *vs.* United States of America, Appellee, on June 8, 1934, 71 F. (2d) 361, affirming the judgment of the United States District Court for the Middle District of Georgia.

I.

The Case.

Madison L. Miller, Jr., filed suit against the United States in the United States District Court for the Middle District of Georgia to recover total permanent disability

benefits of $57.50 per month from October 26, 1918, payable under a contract of yearly renewable term insurance issued to him through the Bureau of War Risk Insurance about January 22, 1918, because of injuries received by him in a troop train wreck in France (R. 11).

Defendant admitted issuance of the policy, the payment of premiums continuing the insurance in force to May 31, 1919, the due filing of the claim, and that a disagreement had arisen (R. 11).

The only issue made upon the trial of the case was whether or not plaintiff became totally disabled while said insurance was in force by the payment of premiums, as counsel for defendant conceded in open court that plaintiff's injuries were permanent, but contended that they did not render plaintiff totally disabled within the terms and meaning of the insurance contract and the law (R. 11).

The evidence for plaintiff and the fair inferences therefrom show:

Plaintiff's right hand was badly mangled in a train wreck on October 26, 1918. At the same time he received injuries about the face and head. Two days later his right arm was amputated above the elbow. His left eye was defective from birth, and after his injury and while in the hospital in France he discovered that he could see only the outline of large objects with his left eye. At that time he had only one-tenth vision in the left eye and no use of that eye; that its condition was then permanent and could not be corrected (R. 12, 15).

The extent of plaintiff's schooling was the third grade in high school. Prior to his enlistment he was a practical engineer, not a graduate engineer, and he could not do the engineering work for which he was trained after his injuries (R. 12-13).

Plaintiff's first job after he was discharged was given him out of sympathy and lasted only one month. He ob-

tained several other jobs after this with different employers, but in each case after a short period of employment he had to give up these jobs because of his handicaps rendering him unable to do the work required (R. 13-14).

He then tried selling stocks on a commission, and worked at this for twenty-two months, but earned during the entire time only $105. In 1931 he tried selling goods for the Fuller Brush Company and worked at this from January until May and earned only $20. He has no talent for sales jobs. During the period from April, 1919, when he was discharged from the Army, to the date of the trial, July, 1933, he earned only $405 (R. 14-15).

During the intervals between jobs plaintiff obtained and lost he tried diligently to get other employment, but could not in competition with others who had two hands and two good eyes (R. 14).

He was right-handed before his injury, and the loss of his right arm and his left eye rendered him much more seriously handicapped than if he had lost an arm and an eye on the same side (R. 13, 15).

The medical witness for plaintiff testified he knew of no gainful occupation plaintiff could follow, and that with the loss of his right arm and left eye he was totally disabled (R. 15).

Upon the conclusion of plaintiff's evidence counsel for defendant moved for a directed verdict on the following grounds:

> "(1) That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.
>
> "(2) Because it affirmatively appears from the plaintiff's evidence that the eye disability existed prior to the issuance of the War Risk Insurance sued upon, and because the remaining disability, to-wit, the loss of an arm, is not a total disability" (R. 16).

Thereupon, the trial judge stated that he would overrule the second ground of the motion for directed verdict, and that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. The verdict was so directed, and upon this verdict judgment was entered for the defendant against the plaintiff for costs (R. 17).

Upon the final judgment plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court affirmed the judgment of the District Court on June 8, 1934, and decided that subdivision 3 of Section 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473), was not applicable to war risk insurance; and that Regulation 3140 of the Veterans' Administration, providing that certain specific losses, among them the permanent loss of the use of a hand and an eye, shall be deemed total permanent disability under yearly renewable term insurance, was beyond the authority of the Director of the Veterans' Bureau, or the Administrator of Veterans' Affairs, to issue, and not binding upon the courts; and that regulations aside, the evidence did not warrant a finding of total permanent disability (R. 27, 24, 25).

II.

Questions Presented.

(1) Is subdivision 3 of Section 202 of the World War Veterans' Act, 1924, as amended (38 U. S. C. A., Sect. 473), providing that certain losses, among them the permanent loss of the use of one hand and one eye, shall be deemed to

be total permanent disability, applicable to war risk insurance?

(2) Is Regulation 3140 of the Veterans' Administration beyond the power and authority of the Director of the Veterans' Bureau (now Administrator of Veterans' Affairs) to make, and therefore not binding on the courts?

This regulation is as follows:

> "Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest."

(3) Was there any evidence upon which a verdict for petitioner might properly be found?

(4) Did not the Circuit Court of Appeals, in affirming the action of the trial court in directing the jury to return a verdict for defendant, deprive petitioner of his constitutional right of trial by jury, given him by the Seventh Amendment to the Constitution of the United States?

III.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A. Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was beyond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

IV.

Reasons for Granting Certiorari.

(1) The questions presented in this petition are of great importance because they not only vitally affect the rights of all veterans insured under war risk insurance contracts and disabled by certain losses specified in the statute (38 U. S. C. 473) and Regulation 3140, but they vitally affect the thousands of Government (converted) contracts of insurance now in force which contain provisions making the identical losses specified in the statute and Regulation 3140 total permanent disability under such contracts. If the Director of the Veterans' Bureau, or Administrator of Veterans' Affairs, had not the power and authority to make Regulation 3140, he has no power or authority to insert a similar provision in the Government (converted) contracts of insurance, or to issue Regulation 3122, identical with Regulation 3140, except it applies to United

States Government life insurance (converted insurance) rather than yearly renewable term insurance. If Regulation 3140 is invalid, similar provisions in converted policies are likewise invalid. If subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, is not applicable to war risk insurance (term insurance), it is not applicable to converted contracts of Government life insurance. The power and authority of the Director of the Veterans' Bureau, or Administrator of Veterans' Affairs, to determine the terms and conditions of converted insurance and to make regulations relative thereto are identically the same as his power and authority relative to yearly renewable term insurance.

(2) The Circuit Court of Appeals in this case has decided important questions of Federal law which have not been, but should be, settled by this Court, to-wit: The application of subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended, and the validity of Regulation 3140 of the Veterans' Administration.

These questions should be settled by this Court because they vitally affect the power and authority of the Director of Veterans' Affairs to determine and publish terms and conditions of insurance contracts providing protection against total permanent disability, and rules to govern the Veterans' Administration in determining what shall constitute total permanent disability, and because they affect the rights of thousands of persons insured by the Government through the Veterans' Bureau and the Veterans' Administration.

(3) The decision of the Circuit Court of Appeals in this case, as to the application of subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, (38 U. S. C. 473) and the validity of Regulation 3140, is in conflict with de-

cisions of the Circuit Court of Appeals for the Ninth Circuit in the following cases:

U. S. v. *Law,* 299 Fed. 61 (see page 64) Reversed by this Court on jurisdictional question (266 U. S. 494);

U. S. v. *Rasar,* 45 F. (2d) 545 (see page 548);

Sorvik v. *U. S.,* 52 F. (2d) 406 (see page 411).

The decision in the instant case as to the validity of Regulation 3140 is in conflict with the clear inferential holding of the Circuit Court of Appeals for the Sixth Circuit in the case of *United States* v. *Cole,* 45 F. (2d) 339, 340, that old Regulation 4, to the same effect as Regulation 3140, is a valid part of the insured's contract of war risk insurance.

(4) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, in that it has overturned the construction or interpretation of veteran legislation adhered to for years by those charged with the administration of such laws, during which time these laws have been repeatedly amended without Congress evidencing any disapproval of the Bureau's interpretation of Sect. 473, Title 38, U. S. Code, and similar provisions of prior laws. Likewise, Regulation 3140 is of the same import as earlier Regulation 57 of the Bureau of War Risk Insurance, issued November 26, 1920, and Regulation 4 of the Veterans' Bureau, issued September 12, 1921. Congress has shown no disapproval of these regulations while repeatedly amending the laws relative to both compensation and insurance. Applicable decisions of this Court, among many, are:

U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898;

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;

U. S. v. *John Bailey,* 9 Peters 238, 256, 11 Curtis 341, 345.

(5) The decision of the Circuit Court of Appeals on the sufficiency of the evidence and affirming the action of the trial court in directing a verdict is violative of the principles announced by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 94, and *Lumbra* v. *U. S.*, 290 U. S. 551 (Advance Opinions), and is an infringement of the constitutional right of trial by jury given by the Seventh Amendment to the Constitution of the United States.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted and its judgment reversed.

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

FLORIDA,
Dade County:

Personally appeared before the undersigned officer, authorized to administer oaths, Madison L. Miller, Jr., who, being duly sworn, deposes and says that he is petitioner in the foregoing petition for certiorari and has read the same, and that the facts stated therein are true, and that said application for certiorari is not made for the purpose of delay, but that he is advised and believes that he has meritorious reasons why he should apply for a writ of certiorari to be granted in the within stated case.

MADISON L. MILLER, JR.

Sworn to and subscribed before me, this 29th day of August, 1934.

[SEAL.]

M. E. COOPER,
Notary Public.

Notary Public, State of Florida at Large. My Commission expires Feb. 26, 1936.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The trial court filed no opinion in this case, but the judge's view of the law is shown by his statement on directing a verdict for defendant (R. 16). The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 361.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347. The judgment of the Circuit Court of Appeals to be reviewed was entered June 8, 1934 (R. 27).

III.

Statement of the Case.

We believe the statement of the case in the petition for writ of certiorari is adequate, and for the sake of brevity we are not restating it here.

IV.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A. Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was be-

yond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

V.

Summary of Argument.

(1) Subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, as amended, (38 U. S. C. 473) defining or declaring total permanent disability to include certain specific losses, among them the permanent loss of the use of a hand and an eye, is applicable to war risk insurance, as shown by the legislative, administrative and judicial history of this provision and a consideration of the entire Act. (38 U. S. C. 473 quoted in part in Appendix, pg. 29.)

(2) Regulation 3140 is within the power and authority of the Administrator of Veterans' Affairs, formerly the Director of the Veterans' Bureau, to issue, either under 38 U. S. C. 473, or independently of this section under general powers and authority conferred on the Director of the Veterans' Bureau and transferred to the Administrator.

(3) There was evidence before the jury upon which a verdict for petitioner might properly be found, and petitioner has been deprived of his constitutional right of trial by jury.

VI.

ARGUMENT.

Application of 38 U. S. C., Section 473.

The legislative, administrative and judicial history of veteran legislation, and particularly subdivision 3, Sect. 202, World War Veterans' Act, 1924, as amended (38 U. S. C. Sect. 473) shows that it was the purpose and intent of Congress that a definition of total permanent disability to include certain losses, among them the permanent loss of the use of a hand and an eye, as provided in 38 U. S. C. 473, apply to war risk insurance, or yearly renewable insurance, as well as compensation allowances.

The War Risk Insurance Act of 1917 provided for compensation under Article 3 and insurance under Article 4. Section 400 of this Act states the purpose of granting insurance is to give greater protection against death and total disability than given under the article covering compensation. (See Appendix, pg. 29.) It is both logical and reasonable to conclude that Congress had in mind the same total disability for which compensation was provided, the only added condition being that such disability be permanent. Pursuant to authority given in the Act of 1917, Treasury Decision 20, Regulation 11, was issued March 9, 1918, declaring in its first paragraph:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability."

Here the Treasurer and the Director made no distinction between total disability for compensation and insurance.

It is proper to assume that Congress knew the interpretation given its statutes by its administrative officers. With

this knowledge that total permanent disability for compensation and insurance were considered identical, Congress amended Section 302 of the Act of 1917, and provided:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month." (Act approved Dec. 24, 1919, 41 Stat. 373.)

With knowledge that the Bureau construed total permanent disability the same for compensation and insurance purposes, it is significant that Congress did not limit by express words the specific disabilities deemed total permanent disabilities to compensation. Congress having referred to the article on compensation in the insurance article, and the Bureau having defined them as identical, it was needless for Congress to repeat the specific disabilities in the insurance section. It is significant, too, that Congress in its amendatory act of 1919 used the identical phrase of the insurance section, to-wit: "total permanent disability," further showing it intended the same disabilities for compensation and insurance.

After this amendment, on November 26, 1920, the Director issued Regulation 57, quoted in the Appendix, pg. 29, expressly making the disabilities deemed by statute total permanent disabilities total permanent disabilities for both insurance and compensation. Later, on September 12, 1921, the Director issued Regulation 4, quoted in Appendix, pg. 30, which was in this particular substantially the same as Regulation 57 above mentioned.

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Law,* 299 Fed. 61, said, relative to interpretations of total permanent disability under war risk insurance:

> "Of course, no interpretation which is against reasonable common sense can be sustained. Nor can any be upheld which is in conflict with the declaration in the Amendment of December 24, 1919, 41 St. 373, 374, Sect. 302, being Comp. St. Ann. Supp. 1923, Sect. 514 (4), wherein Congress provided in effect that compensation shall be allowed if and while the disability is rated as total and permanent; provided, however, that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> *U. S.* v. *Law,* 299 Fed. 61, 64 (2). Decided May 12, 1924.

While it is true that *Law* v. *U. S.* was reversed by the Supreme Court on a jurisdictional question January 5, 1925 (266/494), it has been cited by other courts as authority on other questions. Nevertheless, it shows an appellate court's construction and application of 38 U. S. C. 473.

With this decision outstanding, and necessarily with knowledge of the interpretation put by the Bureau in its published regulations on Section 302, subdivision 3, of the War Risk Insurance Act, as amended, Congress re-enacted and amended Section 302 of the War Risk Insurance Act in the World War Veterans' Act, approved June 7, 1924, as Section 202, without limiting the statutory disabilities of subdivision 3 to compensation. Had Congress intended to make the disabilities deemed by it total permanent disabilities applicable only to the compensation sections, it is but reasonable to conclude that it would have used some such

expression as "for purposes of this section," or similar language, to note a limited application.

By Act approved March 4, 1925, Paragraphs 6, 7, 9 and 10 of Section 202 of the World War Veterans' Act was amended, but Paragraph 3 was not changed. By Act approved July 2, 1926, Section 202, Par. 3 of the World War Veterans' Act of 1924 was amended to add another disability to those deemed total permanent disability, but no change was made in the form or wording of the section to show that it was not applicable to insurance as construed by the courts and the Bureau.

Regulation 3140, providing that the loss of the use of one hand and one eye shall be deemed total permanent disability under yearly renewable term insurance, is substantially the same in that particular as Regulations 57 and 4, heretofore cited. The opinion of the Circuit Court of Appeals in this case gives the date of issuance of this regulation as March 24, 1932. We were advised by letter from the Veterans' Administration, dated April 25, 1934, and signed by James T. Brady, Acting Solicitor, that this regulation was first issued in May, 1930. See Appendix, pg. 32.

With knowledge of these regulations and the practice of the Bureau, Congress again, by Act approved July 3, 1930, amended the World War Veterans' Act. Section 202, subdivision 3, was amended, but the first paragraph in that subdivision, declaring certain disabilities total permanent disabilities, was re-enacted unchanged. Again Congress showed no dissatisfaction with the Director's interpretation of its statutes and purposes.

There is nothing in the many amendments to the War Risk Insurance Act and the World War Veterans' Act to show that Congress did not approve of the Bureau's interpretation of total permanent disability for insurance purposes. But to the contrary, Congress has further shown its

approval of the Bureau's interpretations of the Act and the regulations issued thereunder by having published, pursuant to Senate concurrent resolution 29, adopted June 27, 1932, a compilation of the Federal laws relating to veterans of wars of the United States, with explanatory notes and annotations. The compilation so published was furnished to the Senate pursuant to a resolution dated January 21, 1931, as follows:

> "Resolved, That the Administrator of Veterans' Affairs is requested to prepare and transmit to the Senate, in form suitable to be printed, a codification of all Federal laws relating to the veterans of our various wars, which codification shall contain (1) appropriate explanatory notes and annotations to each section of such codification and (2) suitable headings, reference tables, and indices, for the purpose of making available a clear and *complete statement of all the rights and privileges of such veterans.*" (Italics ours.)

On page 257 of this compilation designated Senate Document No. 131 appears provision 20 of the Government converted policy, making the same disabilities specified in Sect. 473, Title 38 U. S. C., total permanent disabilities under the insurance contract. And also on page 274 of this compilation is the following:

> "Statutory total permanent disabilities.—The statutory total permanent disabilities as included in subparagraph 3, Section 202, World War Veterans' Act, dealing with compensation, are here set forth as statutory total permanent disabilities for insurance (R. & P. 3122). (See also R. & P. 3140.)"

The resolutions above cited and quoted may be found on pages X, IX and XI of the compilation published by the Government Printing Office August 1, 1932, as Senate Document 131 and entitled "Federal Laws Relating to Veterans of Wars of the United States (Annotated)."

Two Circuit Courts of Appeals have definitely approved the application of 38 U. S. C. Sect. 473, to war risk insurance.

The Circuit Court of Appeals for the Ninth Circuit clearly considered Section 202, World War Veterans' Act (38 U. S. C. Sect. 473) applicable to war risk insurance:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work for short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans' Act, 1924, Sect. 202, as amended (38 U. S. C. A., Sect. 473), and its regulations. To be sure, he may not claim total disability merely upon the ground that he is no longer able to engage in farming, yet if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."
>
> *U. S.* v. *Rasar*, 45 F. (2d) 545, 548 (C. C. A. 9).

The same reiterated:

> *Sorvik* v. *U. S.*, 52 F. (2d) 406, 411 (C. C. A. 9).

See also:

U. S. v. *Law*, 299 Fed. 61, 64 (2).

The decision in *U. S.* v. *Cole*, 45 F. (2d) 339, is an inferential holding that Regulation 4 and Sect. 473, U. S. C. A., Title 38, are part of the war risk insurance contract, and the insured would be entitled to the total disability benefits if he had proved that he lost the sight of both eyes while the policy was in force.

Both compensation and insurance are provided for by the same Act. Both protect against total permanent disability. The Act nowhere undertakes to define total permanent disability other than in 38 U. S. C. 473. In the

absence of express restriction, it is to be assumed that the term "total permanent disability" is used throughout the statute in the sense first defined.

Rampanga Sugar Mills v. *Trinidad,* 279 U. S. 211, 73 L. Ed. 665 (2).

The foregoing legislative, judicial and administrative history of 38 U. S. C. Sect. 473, shows it was the intent of Congress that the instances of total permanent disability there specified should apply to war risk insurance.

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;

U. S. v. *Bailey,* 9 Peters, 238, 256, 11 Curtis 341, 345;

Swigart v. *Baker,* 229 U. S. 187;

U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898.

(2) Regulation 3140 Authorized and Binding on Government and Insured.

If 38 U. S. C. 473 is applicable to war risk insurance, it follows necessarily that Regulation 3140 is authorized.

Further, we submit that independently of whether Section 473, Title 38 U. S. C. is construed as within itself authorizing that total permanent disability under insurance contracts, as well as under compensation provisions, shall include the specific instances therein mentioned, Regulation 3140 and similar prior regulations are valid and within the broad powers of the Director of the Veterans' Bureau, now the Administrator of Veterans' Affairs, consistent with the act granting war risk insurance, and correctly interpret the purposes and intent of Congress.

House Report 130, 65th Congress, reporting on the bill that became the War Risk Insurance Act of 1917, shows that one of the controlling purposes of the War Risk Insurance Act was to afford the soldier the opportunity to carry insurance against death and permanent total dis-

ability on a parity with persons not engaged in war service, the rate to the soldier to be the peace-time rate, the Government to take care of the expense of the extra hazard of military service. Certainly, Congress intended that war risk insurance should be as liberal in its terms, conditions and provisions, and as protective in its scope, as any similar policies issued in civil life. We think this Court may take judicial notice of the fact that policies of insurance companies quite generally carry a provision making the loss of both feet, or both hands, or both eyes, or a hand and an eye, total permanent disability under the policy. Certainly, a regulation that affords equal protection and advantages is in accord with the purposes of Congress.

Another purpose of Congress in granting war risk insurance was to obviate the necessity for future pension legislation as had been enacted in the past.

We do not contend that the Director of the Veterans' Bureau can amend, modify or enlarge the statutes of Congress; but we do contend that it is the power and duty of the Director, now Administrator of Veterans' Affairs, to interpret the statutes, determine the purposes of Veterans' legislation, and supplement the statutes by regulations to make clear the purposes of such legislation and the rights and liabilities of the insured and the Government thereunder.

Relevant parts of Section 13 of the War Risk Insurance Act approved October 6, 1917, provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections

> five and four hundred and five. * * * The director shall adopt reasonable and proper rules * * * to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act * * *."

The relevant parts of Section 402 of the same Act of 1917 provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall determine upon and publish the full and exact terms and conditions of such contract of insurance * * * Provision for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *"

Under this authority Treasury Decision 20 W. R. was issued, interpreting total permanent disability for insurance and compensation the same. And later, under the same authority, Regulation 57 was issued, placing certain specific losses, including the permanent loss of the use of a hand and an eye, within the term "total permanent disability," both for compensation and insurance.

With knowledge of these regulations, by the Act approved August 9, 1921, Congress created the office of Director of the Veterans' Bureau, and thereby gave and transferred to him the same power and authority theretofore conferred on the Director of the Bureau of War Risk Insurance. Nothing in this Act shows any disapproval of the former Director's interpretation of the intent and purpose of Con-

gress given in the regulations issued. Thereafter the Director of the Veterans' Bureau issued Regulation 4, to the same effect as old Regulation 57.

With knowledge of the Bureau's regulations, Congress, in the World War Veterans' Act, reaffirmed its power to issue regulations in much the same language as the original Act, without showing the slightest disapproval of the regulations issued.

The relevant part of Section 5 of this Act of 1924 is as follows:

> "The director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV, of this Act, shall be conclusive except as otherwise provided herein. * * * The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act * * * "

By Act approved March 4, 1925, Section 301 of the World War Veterans' Act, 1924, was amended, and a provision of the original War Risk Insurance Act omitted from the Act of 1924 was inserted, to-wit:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage

> of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

No disapproval of the Bureau's regulations cited is shown here.

Congress again amended Sect. 301 of the World War Veterans' Act by Act approved June 2, 1926, but retained the provisions of that section inserted by the Amendment of March 4, 1925, above quoted, and showed no disapproval in this Amendment of the regulations theretofore issued; and again, by Act approved May 29, 1928, amended Sect. 301 of the World War Veterans' Act, and continued the powers theretofore given the Director without disapproval of the regulations issued.

The Director of the Veterans' Bureau then issued Regulation 3140, as we are advised, in May, 1930.

With knowledge of these regulations and the Bureau's interpretation of the laws granting insurance and the purposes of Congress, by Act approved July 3, 1930, Congress again amended the World War Veterans' Act, Section 5, prescribing the general powers of the director, to make his decisions on questions of law, as well as of fact, conclusive, except as otherwise provided in the Act. (See 38 U. S. C. A. 426, 1933 Cumulative Supplement.)

Likewise, by this same Act of July 3, 1930, Section 301, Paragraph 3, of the World War Veterans' Act was amended, but authority to make such other provisions from time to time, by regulation, for the protection and advantage of the insured, as may be found to be reasonable and practicable, was retained.

By another Act adopted the same date, July 3, 1930, the Veterans' Administration was provided for, and all the power and authority of the Director of the United States Veterans' Bureau was conferred and vested in the Admin-

istrator of Veterans' Affairs; and nothing is shown in this Act as disapproving the regulations of the Director.

Likewise, with knowledge of the Bureau's interpretation of the term "total permanent disability," contained in Sect. 400 of the War Risk Insurance Act of 1917, this general term was retained in Sect. 300 of the World War Veterans' Act, 1924, and the subsequent Acts of March 4, 1925, (43 Stat. at L. 1302, 1308); July 2, 1926, (44 Stat. at L. 790, 798); and May 29, 1928, (45 Stat. at L. 964, 967), amending and re-enacting this section without change or limitation to show disapproval of the Bureau's interpretation.

The Veterans' Bureau has interpreted and construed veteran legislation providing for insurance in accordance with the regulations here discussed for a period of nearly fourteen years. Clearly, the interpretations placed upon veteran legislation by the Director of the Veterans' Bureau, and the regulations issued pursuant thereto, have received legislative sanction and should not be overturned.

See:

United States v. *John Bailey*, 9 Peters 238, 256, 11 Curtis 341, 345;

Johnson v. *Manhattan R. Co.*, 289 U. S. 479, 500, 77 L. Ed. 1331, 1346;

National Lead Co. v. *U. S.*, 252 U. S. 140, 146, 64 L. Ed. 496, 499, 500.

See also decisions of this Court cited on page 20.

Authorized regulations relative to war risk insurance form part of the contract, and are binding on both the Government and the insured. They have the force of law and are binding on the courts.

White v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530;

U. S. v. *Cole*, 45 F. (2d) 339 (C. C. A. 6);

Ross v. *U. S.*, 49 F. (2d) 541 (C. C. A. 5);

Bartee v. *U. S.*, 60 F. (2d) 247 (1) (C. C. A. 6).

(3) Sufficiency of the Evidence.

The evidence and the fair inferences therefrom show:

Petitioner lost his right arm above the elbow on October 26, 1918, during which time his insurance was of force by payment of premiums. At the same time he had only one-tenth vision in his left eye and could see only the outline of large objects. His eye condition could not then be corrected. He had lost the use of his left eye. (See *Pan-American Life Insurance* v. *Terrell,* 29 F. (2d) 460 (C. C. A. 5), and cases there cited so holding.)

He was right-handed before he lost his right arm. He is not a highly educated man, having gone only as far as the third year in high school. He could not follow his former employment because of his disabilities. He gave up his training course on advertising because his health got bad. The jobs he procured were given him out of sympathy and were of a temporary nature, or given him on a commission basis, or on a basis the employer was to pay him whatever he might determine he was worth. The jobs to which there was any fixed remuneration attached he had to give up because of his disabilities. He has no talent for sales jobs and could not make anything at such work. He tried diligently to get other employment, but could not, in competition with others who had two hands and two good eyes. By his efforts over a period of years he was able to make only $405. The loss of an eye and an arm on opposite sides of the body is much more disabling than the loss of an eye and an arm on the same side of the body. Because of the difficulty of co-ordination between an eye and a hand on opposite sides, the medical witness testified, in his opinion petitioner was totally disabled.

Certainly this is substantial evidence to prove him totally disabled, which was the only issue in the case. Is there any better evidence that a man is unable to follow a substantially

gainful occupation than the proof that he tried various jobs and lost them because of his handicap? Can there be more definite proof that a man is unable to obtain employment in competition with others than diligent effort to obtain employment over a period of years and failure because of his disabilities? Is there more effective proof that a man is disabled to follow a gainful occupation than the proof of trial over a period of years resulting in the meager earnings of $405 in more than fourteen years? Is it not indulging in pure speculation in behalf of defendant for the court to say, under the evidence, that this man is able in spite of his disabilities to follow substantially gainful employment?

The ability to get employment, as well as the ability to do the required work after employment, is an important factor in determining whether one is totally disabled.

> "Evidence that insured suffered from recurrent skin disease, which rendered him unable, because of his appearance, to obtain employment, sustained finding of total permanent disability under war-risk policy."
>
> *United States* v. *Ranes*, 48 F. (2d) 582 (2).

> "Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of sound mind and average attainments under the usual conditions of life."
>
> *United States* v. *Cox*, 24 F. (2d) 944, 946.

This Court held in *Gunning* v. *Cooley*, 281 U. S. 90, in determining a motion of either party for a peremptory instruction, the court assumes that the evidence of the opposing party proved all that it may reasonably be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them, and that the credibility of witnesses and the weight to be given to their testimony are for the jury.

From an examination of the opinion of the Circuit Court of Appeals in this case it is apparent that the court did not draw, in favor of petitioner, all the inferences fairly deductible from the facts proven. The Circuit Court of Appeals apparently disregarded the eye disability and considered it of no handicap. The court was apparently determining the credibility of the witness rather than the fair inferences from the facts proven as to the disability resulting. The court apparently determined the weight to be given to the witnesses' testimony in the light of the circumstance that the eye had been defective from birth. However, we submit that the evidence does not show that the insured's eye was as totally defective at birth as it was at the time of his injury in October, 1918. This Court may take judicial notice of the fact that persons are not admitted to the Army when one eye is so defective, and from this it is presumable that petitioner's eye was not so defective even in 1917, when he enlisted.

Likewise, the Circuit Court of Appeals, in determining the effect of the eye deficiency, disregarded the medical testimony as to the increased difficulty of directing the work of a hand on the opposite side from the eye. Further, the Circuit Court of Appeals determined the credibility of petitioner's testimony that he tried diligently to get employment but could not in competition with others with two good hands and two good eyes as shown from the statement in the opinion: "Having no dependents and $90 a month compensation, he was under no necessity to work." There is no evidence in the record to show whether or not petitioner had dependents, and we are at a loss to understand how the Circuit Court of Appeals so concluded. As a matter of fact, petitioner was married and had a wife dependent on him.

The circumstance of long delay before bringing suit unexplained may, in some cases, affect the credibility of in-

sured's testimony; but this is a matter for the jury. To make it controlling would be to defeat by rule of evidence the limitation period fixed by Congress.

When it is remembered that in the case of yearly renewable insurance no policy was issued to the insured, and the average insured had little opportunity to know the law and practically no opportunity to know the regulations which constituted his policy, as these were not published in form available for the general public, it is not surprising that many veterans were ignorant of their rights for a long time and took no action to protect them. Certainly, Congress considered there were meritiorious claims that had not been presented and good reason for delay when it extended the time for making claim and bringing suit.

Pure ignorance of the contracts and the rights under them and the law no doubt accounts for many of the delays. Furthermore, is a man to be deprived of his rights, who is actually disabled, merely because he may believe he is not, and continues trying to work until all efforts and undertakings, one after another, fail and prove the error of such belief?

We submit that under the evidence in this case a jury could have properly found a verdict for petitioner, and that he has been deprived of his constitutional right of a jury trial.

Why Writ Should Issue.

The decision of the Circuit Court of Appeals in this case affects not only the rights of petitioner, but the rights of all persons holding contracts of Government (converted) insurance, and all persons who may have received any of the specific injuries mentioned in the statute and the regulation—the very character of injuries which Congress must have contemplated would be the probable fate of many of the soldiers in battle, and the very character of injuries

the soldier thought he was protecting himself against when he took the insurance.

The Acts of Congress make no distinction between total permanent disability under converted Government life insurance policies and total disability under yearly renewable term insurance; and the powers of the Bureau to declare the terms and conditions of the contract are the same relative to either form of insurance. To strike down this power and strike out the provisions protecting against specific losses in one case is to strike it from all contracts of insurance.

A man who has lost both eyes, or both legs, or both arms, but is otherwise in good health, could probably make no better proof than made in this case. He could show, as here, he tried to work, but that his handicaps defeated him; that he tried to get employment, but was pushed aside by the competition of able-bodied men suffering from no disability.

Other Circuit Courts of Appeals have taken a different view of the law than expressed by the Circuit Court of Appeals in this case.

A power of the Director of the Veterans' Bureau, exercised and acquiesced in for a long period of years, is now challenged.

We respectfully submit that this case presents Federal questions of great importance that should be settled by this Court, that thousands may know the value of their contracts and the Bureau may know how it shall deal with its maimed and dismembered insured veterans.

Respectfully submitted,

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

APPENDIX.

Section 400, War Risk Insurance Act of 1917.

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums hereinafter provided.

38 U. S. C. Sect. 473—Relevant part:

Disability resulting from injury; total and permanent disability; loss of both eyes; loss of use of both eyes and one or more limbs; tubercular ex-service men. If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: Provided, however, That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: Provided further, That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: Provided further, That for double total permanent disability the rate of compensation shall be $200 per month.

War Risk Regulation 57—Relevant parts:

IV. For compensation purposes a disability from injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz: "Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously any substantially gainful occupation and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

(c) When a presumption of total permanent disability is established under the following conditions: * * *

VII. Upon a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with provisions of Paragraph IV above. Such awards may be made retroactive to the date of the commencement of such total permanent disability if the case falls within the provisions of subparagraph (a) or (b) of Paragraph IV above, or to the date of the commencement of the period during which the person is presumed to be permanently and totally disabled if the case falls within subparagraph (c) of Paragraph IV above.

Awards of total permanent disability under the contract of converted insurance shall be governed by the terms and conditions of the converted policy.

IX. Regulation 54 is hereby revoked and all other bulletins, Treasury decisions, or regulations in conflict with this regulation are modified accordingly.

United States Veterans' Bureau Regulation No. 4, Division B:

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, "Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously a substantially gainful occupation, and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

VII. On a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with the provisions of Paragraph IV above. Such awards shall be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of said paragraph.

X. Bureau of War Risk Insurance Regulation 57 is hereby revoked and all other bulletins, Treasury decisions or regulations in conflict with this regulation are modified accordingly.

Regulation 3122:

Statutory total permanent disabilities. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after

the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Letter:

Washington, April 25, 1934.

In Reply Refer to: CC-A.

Mr. Jas. A. Lowrey, Jr.,
c/o Miller & Lowrey,
Attorneys at Law,
Macon, Georgia.

DEAR SIR:

Your letter dated April 13, 1934, addressed to Mr. E. Julian Peacock, Clerk, Committee on Naval Affairs, House of Representatives, Washington, D. C., relative to your desire to secure a compilation of the regulations of the Veterans' Administration, and if there is no such printed compilation, then requesting specific information relative to the effective date of Paragraph R-3140, Regulations and Procedure, Veterans' Administration, has been referred by Honorable Carl Vinson, House of Representatives, Washington, D. C., to this Administration for attention.

The Regulations and Procedure of the Veterans' Administration is a loose-leaf compilation consisting of sections pertaining to Adjudication, Adjusted Compensation, Finance, Supply, Insurance, Legal, Medical, etc. Only sufficient copies of this loose-leaf compilation were printed to meet the needs of the employees of the Veterans' Administration, except copies have been furnished to other Federal agencies and to accredited representatives of recognized veterans' and welfare organizations. This loose-leaf compilation is not published as a public document and cannot be purchased.

Paragraph 3140 of Regulations and Procedure was first incorporated in this loose-leaf compilation at the time it was originally prepared and when distributed in May 1930 was accompanied by a memorandum over the signature of the then Director of the United States Veterans' Bureau containing the statement: "This Insurance portion amends

and supersedes all other Regulations, General Orders, Circulars, and other instructions issued prior to March, 1930, as conflict therewith wholly or in part." The language that was incorporated in this Paragraph R-3140 was taken from the insurance policy contract.

Public No. 90, 65th Congress, approved October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been modified from time to time until these statutory permanent total disabilities are those listed in the paragraph above referred to. While said statutory permanent and total disabilities as contained in the law are with reference to the payment of compensation, the Veterans' Administration adopted the policy of making these same disabilities the basis of awarding insurance for permanent and total disability for both term insurance and converted insurance purposes. In the World War Veterans' Act, 1924, as amended, the provision for statutory permanent and total disabilities is contained in Section 202 (3). As stated above this provision first appeared in the Act of October 6, 1917, and has been amended by amendatory Acts dated June 25, 1918, August 6, 1919, December 24, 1919, June 7, 1924, and July 2, 1926.

It is noted you have a copy of Senate Document No. 131, 72nd Congress, 1st Session, "Federal Laws Relating to Veterans of Wars of the United States," already in your possession. On page 132 thereof under Section 463 you will find a historical note relative to Section 202 (3) of the World War Veterans' Act, 1924, as amended.

Yours very truly,

JAMES T. BRADY,
Acting Solicitor.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 342

MADISON L. MILLER, Jr.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES

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No. 342

MADISON L. MILLER, JR.,

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THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

I.

Opinions Below.

The trial court filed no opinion in this case, but the judge's view of the law is shown by his statement on directing a verdict for defendant (R. 16). The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 361.

II.

Jurisdiction.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347, having granted on De-

cember 3, 1934, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case. The judgment of the Circuit Court of Appeals to be reviewed was entered June 8, 1934.

III.

Statement of the Case.

Madison L. Miller, Jr., filed suit against the United States in the United States District Court for the Middle District of Georgia to recover total permanent disability benefits of $57.50 per month from October 26, 1918, payable under a contract of yearly renewable term insurance issued to him through the Bureau of War Risk Insurance about January 22, 1918, because of injuries received by him in a troop train wreck in France (R. 11).

Defendant admitted issuance of the policy, the payment of premiums continuing the insurance in force to May 31, 1919, the due filing of the claim, and that a disagreement had arisen (R. 11).

The only issue made upon the trial of the case was whether or not plaintiff became totally disabled while said insurance was in force by the payment of premiums, as counsel for defendant conceded in open court that plaintiff's injuries were permanent, but contended that they did not render plaintiff totally disabled within the terms and meaning of the insurance contract and the law (R. 11).

The evidence for plaintiff and the fair inferences therefrom show:

Plaintiff's right hand was badly mangled in a train wreck on October 26, 1918. At the same time he received injuries about the face and head. Two days later his right arm was amputated above the elbow. His left eye was defective from birth, and after his injury and while in the hospital in France he discovered that he could see only the outline

of large objects with his left eye. At that time he had only one-tenth vision in the left eye and no use of that eye; that its condition was then permanent and could not be corrected (R. 12, 15).

The extent of plaintiff's schooling was the third grade in high school. Prior to his enlistment he was a practical engineer, not a graduate engineer, and he could not do the engineering work for which he was trained after his injuries (R. 12-13).

Plaintiff's first job after he was discharged was given him out of sympathy and lasted only one month. He obtained several other jobs after this with different employers, but in each case after a short period of employment he had to give up these jobs because of his handicaps rendering him unable to do the work required (R. 13-14).

He then tried selling stocks on a commission, and worked at this for twenty-two months, but earned during the entire time only $105. In 1931 he tried selling goods for the Fuller Brush Company and worked at this from January until May and earned only $20. He has no talent for sales jobs. During the period from April, 1919, when he was discharged from the Army, to the date of the trial, July, 1933, he earned only $405 (R. 14-15.)

During the intervals between jobs plaintiff obtained and lost he tried diligently to get other employment, but could not in competition with others who had two hands and two good eyes (R. 14).

He was right-handed before his injury, and the loss of his right arm and his left eye rendered him much more seriously handicapped than if he had lost an arm and an eye on the same side (R. 13, 15).

The medical witness for plaintiff testified he knew of no gainful occupation plaintiff could follow, and that with the loss of his right arm and left eye he was totally disabled (R. 15).

Upon the conclusion of plaintiff's evidence counsel for defendant moved for a directed verdict on the following grounds:

> "(1) That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.
>
> "(2) Because it affirmatively appears from the plaintiff's evidence that the eye disability existed prior to the issuance of the War Risk Insurance sued upon, and because the remaining disability, to-wit, the loss of an arm, is not a total disability." (R. 16.)

Thereupon, the trial judge stated that he would overrule the second ground of the motion for directed verdict, and that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. The verdict was so directed, and upon this verdict judgment was entered for the defendant against the plaintiff for costs (R. 17).

Upon the final judgment plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court affirmed the judgment of the District Court on June 8, 1934, and decided that subdivision 3 of Section 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473), was not applicable to war risk insurance; and that Regulation 3140 of the Veterans' Administration, providing that certain specific losses, among them the permanent loss of the use of a hand and an eye, shall be deemed total permanent disability under yearly renewable term insurance, was beyond the authority of the Director of the Veterans' Bureau, or the Administrator of

Veterans' Affairs, to issue, and not binding upon the courts; and that regulations aside, the evidence did not warrant a finding of total permanent disability (R. 27, 24, 25).

IV.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was beyond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

V.

Summary of Argument.

(1) Subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, as amended, (38 U. S. C. 473) defining or declaring total permanent disability to include certain specific losses, among them the permanent loss of the use of a hand and an eye, is applicable to war risk insurance,

as shown by the legislative, administrative and judicial history of this provision and a consideration of the entire Act. (38 U. S. C. 473, quoted in part in Appendix, p. 27.)

(2) Regulation 3140 is within the power and authority of the Administrator of Veterans' Affairs, formerly the Director of the Veterans' Bureau, to issue, either under 38 U. S. C. 473, or independently of this section under general powers and authority conferred on the Director of the Veterans' Bureau and transferred to the Administrator.

(3) There was evidence before the jury upon which a verdict for petitioner might properly be found, and petitioner has been deprived of his constitutional right of trial by jury.

VI.

ARGUMENT.

(1) Application of 38 U. S. C., Section 473.

The legislative, administrative and judicial history of veteran legislation, and particularly subdivision 3, Sect. 202, World War Veterans' Act, 1924, as amended (38 U. S. C., Sect. 473) shows that it was the purpose and intent of Congress that a definition of total permanent disability to include certain losses, among them the permanent loss of the use of a hand and an eye, as provided in 38 U. S. C. 473, apply to war risk insurance, or yearly renewable insurance, as well as compensation allowances.

The War Risk Insurance Act of 1917 provided for compensation under Article 3 and insurance under Article 4. Section 400 of Art. 4 of this Act states the purpose of granting insurance is to give greater protection against death and total disability than given under the article covering compensation. (See Appendix, p. 27.) It is both logical

and reasonable to conclude that Congress had in mind the same total disability for which compensation was provided, the only added condition being that such disability be permanent. Pursuant to authority given in the Act of 1917, Treasury Decision 20, Regulation 11, was issued March 9, 1918, declaring in its first paragraph:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability."

Here the Treasurer and the Director made no distinction between total disability for compensation and insurance.

It is proper to assume that Congress knew the interpretation given its statutes by its administrative officers. With this knowledge that total permanent disability for compensation and insurance were considered identical, Congress, on December 24, 1919, amended Section 302 of the Act of 1917, and provided:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month." (Effective as of Oct. 6, 1917, by Act approved Dec. 24, 1919, 41 Stat. 373.)

With knowledge that the Bureau construed total, permanent disability the same for compensation and insurance purposes, it is significant that Congress, in its amendatory Act of 1919, did not limit to compensation by express words the specific disabilities deemed total, permanent disabilities.

Congress having referred in the insurance article of the War Risk Insurance Act of 1917 to the article on compensation, and the Bureau having defined total, permanent disability under both articles as identical, it was needless for Congress, in the amendatory Act of 1919, to amend the insurance section and repeat there the specific disabilities deemed total permanent disability. It is significant, too, that Congress, in the above-quoted provision of its amendatory Act of 1919, used the identical phrase of the insurance section of the War Risk Insurance Act of 1917, to-wit: "total permanent disability," further showing it intended the same statutory disability for compensation and insurance.

On November 26, 1920, the Director issued Regulation 57, quoted in the Appendix, p. 27, expressly making the disabilities deemed by statute total permanent disabilities total permanent disabilities for both insurance and compensation. Later, on September 12, 1921, the Director issued Regulation 4, quoted in Appendix, p. 28, which was in this particular substantially the same as Regulation 57 above mentioned.

Likewise, the Bureau promptly issued converted Government life insurance policies carrying an express provision enumerating the same specific losses mentioned in the amendatory Act of December 24, 1919, and providing that they should be deemed total permanent disability. Such a provision has consistently and continuously been one of the express terms of the printed published policy from that early time until now, and is incorporated in some 600,000 policies in force. (See Telegram of Solicitor, Veterans' Administration, Appendix, p. 31, and respondent's Memorandum on the grant of petition for certiorari, p. 10.)

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Law*, 299 Fed. 61, said,

relative to interpretations of total permanent disability under war risk insurance:

> "Of course, no interpretation which is against reasonable common sense can be sustained. Nor can any be upheld which is in conflict with the declaration in the Amendment of December 24, 1919, 41 St. 373, 374, Sect. 302, being Comp. St. Ann. Supp. 1923, Sect. 514 (4), wherein Congress provided in effect that compensation shall be allowed if and while the disability is rated as total and permanent; provided, however, that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> *U. S.* v. *Law,* 299 Fed. 61, 64 (2). Decided May 12, 1924.

While it is true that *Law* v. *U. S.* was reversed by the Supreme Court on a jurisdictional question January 5, 1925 (266/494), it has been cited by other courts as authority on other questions. Nevertheless, it shows an appellate court's construction and application of 38 U. S. C. 473.

With this decision outstanding, and necessarily with knowledge of the interpretation put by the Bureau in its published regulations and converted life policy on Section 302, subdivision 3, of the War Risk Insurance Act, as amended, Congress re-enacted and amended Section 302 of the War Risk Insurance Act in the World War Veterans' Act, approved June 7, 1924, as Section 202, without limiting the statutory disabilities of subdivision 3 to compensation. Had Congress intended to make the disabilities deemed by it total permanent disabilities applicable only to the compensation sections, it is but reasonable to conclude that it would have used some such expression as "for purposes of this section," or similar language, to note a limited application.

The amendatory Act of June 25, 1918, in amending Section 300 of the Act of 1917, so limited the amendatory provision relative to the presumption of sound health at the time of enlistment, thereby showing that Congress provided for express limitation when it so intended such limitation.

By Act approved March 4, 1925, paragraphs 6, 7, 9 and 10 of Section 202 of the World War Veterans' Act was amended, but paragraph 3 was not changed. By Act approved July 2, 1926, Section 202, par. 3 of the World War Veterans' Act of 1924 was amended to add another disability to those deemed total permanent disability, but no change was made in the form or wording of the section to show that it was not applicable to insurance as construed by the courts and the Bureau.

Regulation 3140, providing that the loss of the use of one hand and one eye shall be deemed total permanent disability under yearly renewable term insurance, is substantially the same in that particular as Regulations 57 and 4, heretofore cited. The opinion of the Circuit Court of Appeals in this case gives the date of issuance of this regulation as March 24, 1932. We were advised by letter from the Veterans' Administration, dated April 25, 1934, and signed by James T. Brady, Acting Solicitor, that this regulation was first issued in May, 1930. See Appendix, p. 30.

With knowledge of these regulations and the practice of the Bureau, Congress again, by Act approved July 3, 1930, amended the World War Veterans' Act. Section 202, subdivision 3, was amended, but the first paragraph in that subdivision, declaring certain disabilities total permanent disabilities, was re-enacted unchanged. Again Congress showed no dissatisfaction with the Director's interpretation of its statutes and purposes.

There is nothing in the many amendments to the War Risk Insurance Act and the World War Veterans' Act to show

that Congress did not approve of the Bureau's interpretation of total permanent disability for insurance purposes. But to the contrary, Congress has further shown its approval of the Bureau's interpretations of the Act and the regulations issued thereunder by having published, pursuant to Senate concurrent resolution 29, adopted June 27, 1932, a compilation of the Federal laws relating to veterans of wars of the United States, with explanatory notes and annotations. The compilation so published was furnished to the Senate pursuant to a resolution dated January 21, 1931, as follows:

> "Resolved, That the Administrator of Veterans' Affairs is requested to prepare and transmit to the Senate, in form suitable to be printed, a codification of all Federal laws relating to the veterans of our various wars, which codification shall contain (1) appropriate explanatory notes and annotations to each section of such codification and (2) suitable headings, reference tables, and indices, for the purpose of making available a clear and *complete statement of all the rights and privileges of such veterans.*" (Italics ours.)

On page 257 of this compilation designated Senate Document No. 131 appears provision 20 of the Government converted policy, making the same disabilities specified in Sect. 473, Title 38 U. S. C., total permanent disabilities under the insurance contract. And also on page 274 of this compilation is the following:

> "Statutory total permanent disabilities.—The statutory total permanent disabilities as included in subparagraph 3, Section 202, World War Veterans' Act, dealing with compensation, are here set forth as statutory total permanent disabilities for insurance (R. & P. 3122). (See also R. & P. 3140.)"

The resolutions above cited and quoted may be found on pages V, IX and XI of the compilation published by the Government Printing Office August 1, 1932, as Senate Document

131 and entitled "Federal Laws Relating to Veterans of Wars of the United States (Annotated)."

Two Circuit Courts of Appeals have definitely approved the application of 38 U. S. C., Sect. 473, to war risk insurance.

The Circuit Court of Appeals for the Ninth Circuit clearly considered Section 202, World War Veterans' Act (38 U. S. C., Sect. 473) applicable to war risk insurance:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work for short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans' Act, 1924, Sect. 202, as amended (38 U. S. C. A., Sect. 473), and its regulations. To be sure, he may not claim total disability merely upon the ground that he is no longer able to engage in farming, yet if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."
>
> *U. S.* v. *Rasar*, 45 F. (2d) 545, 548 (C. C. A. 9).

The same reiterated:

Sorvik v. *U. S.*, 52 F. (2d) 406, 411 (C. C. A. 9).

See also:

U. S. v. *Law*, 299 Fed. 61, 64 (2).

The decision in *U. S.* v. *Cole*, 45 F. (2d) 339, is an inferential holding that Regulation 4 and Sect. 473, U. S. C. A., Title 38, are part of the war risk insurance contract, and the insured would be entitled to the total disability benefits if he had proved that he lost the sight of both eyes while the policy was in force.

Both compensation and insurance are provided for by the same Act. Both protest against total permanent disability. The Act nowhere undertakes to define total per-

manent disability other than in 38 U. S. C. 473. In the absence of express restriction, it is to be assumed that the term "total permanent disability" is used throughout the statute in the sense first defined.

Rampanga Sugar Mills v. *Trinidad,* 279 U. S. 211, 73 L. Ed. 665 (2).

The foregoing legislative, judicial and administrative history of 38 U. S. C. Sect. 473, shows it was the intent of Congress that the instances of total permanent disability there specified should apply to war risk insurance.

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;
U. S. v. *Bailey,* 9 Peters, 238, 256, 11 Curtis 341, 345;
Swigart v. *Baker,* 229 U. S. 187;
U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898.

(2) Regulation 3140 Authorized and Binding on Government and Insured.

If 38 U. S. C. 473 is applicable to war risk insurance, it follows necessarily that Regulation 3140 is authorized.

Further, we submit that independently of whether Section 473, Title 38, U. S. C., is construed as within itself authorizing that total permanent disability under insurance contracts, as well as under compensation provisions, shall include the specific instances therein mentioned, Regulation 3140 and similar prior regulations are valid and within the broad powers of the Director of the Veterans' Bureau, now the Administrator of Veterans' Affairs, consistent with the act granting war risk insurance, and correctly interpret the purposes and intent of Congress.

House Report 130, 65th Congress, reporting on the bill that became the War Risk Insurance Act of 1917, shows that one of the controlling purposes of the War Risk Insurance Act was to afford the soldier the opportunity to

carry insurance against death and permanent total disability on a parity with persons not engaged in war service, the rate to the soldier to be the peace-time rate, the Government to take care of the expense of the extra hazard of military service. Certainly, Congress intended that war risk insurance should be as liberal in its terms, conditions and provisions, and as protective in its scope, as any similar policies issued in civil life. We think this Court may take judicial notice of the fact that policies of insurance companies quite generally carry a provision making the loss of both feet, or both hands, or both eyes, or a hand and an eye, total permanent disability under the policy. Certainly, a regulation that affords equal protection and advantages is in accord with the purposes of Congress.

Another purpose of Congress in granting war risk insurance was to obviate the necessity for future pension legislation as had been enacted in the past.

We do not contend that the Director of the Veterans' Bureau can amend, modify or enlarge the statutes of Congress; but we do contend that it is the power and duty of the Director, now Administrator of Veterans' Affairs, to interpret the statutes, determine the purposes of Veterans' legislation, and supplement the statutes by regulations to make clear the purposes of such legislation and the rights and liabilities of the insured and the Government thereunder.

Relevant parts of Section 13 of the War Risk Insurance Act approved October 6, 1917, provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising

under the Act, except as otherwise provided in sections five and four hundred and five. * * * The director shall adopt reasonable and proper rules * * * to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act * * *."

The relevant parts of Section 402 of the same Act of 1917 provide:

"That the director, subject to the general direction of the Secretary of the Treasury, shall determine upon and publish the full and exact terms and conditions of such contract of insurance * * *. Provision for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *"

Under this authority Treasury Decision 20 W. R. was issued, interpreting total permanent disability for insurance and compensation the same. And later, under the same authority, Regulation 57 was issued, placing certain specific losses, including the permanent loss of the use of a hand and an eye, within the term "total permanent disability," both for compensation and insurance.

With knowledge of these regulations, by the Act approved August 9, 1921, Congress created the office of Director of the Veterans' Bureau, and thereby gave and transferred to him the same power and authority theretofore conferred on the Director of the Bureau of War Risk Insurance. Nothing in this Act shows any disapproval of the former

Director's interpretation of the intent and purpose of Congress given in the regulations issued. Thereafter the Director of the Veterans' Bureau issued Regulation 4, to the same effect as old Regulation 57.

With knowledge of the Bureau's regulations, Congress, in the World War Veterans Act, reaffirmed its power to issue regulations in much the same language as the original Act, without showing the slightest disapproval of the regulations issued.

The relevant part of Section 5 of this Act of 1924 is as follows:

> "The director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV, of this Act, shall be conclusive except as otherwise provided herein. * * * The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act * * *."

By Act approved March 4, 1925, Section 301 of the World War Veterans' Act, 1924, was amended, and a provision of the original War Risk Insurance Act omitted from the Act of 1924 was inserted, to-wit:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage

of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

No disapproval of the Bureau's regulations cited is shown here.

Congress again amended Sect. 301 of the World War Veterans' Act by Act approved June 2, 1926, but retained the provisions of that section inserted by the Amendment of March 4, 1925, above quoted, and showed no disapproval in this Amendment of the regulations theretofore issued; and again, by Act approved May 29, 1928, amended Sect. 301 of the World War Veterans' Act, and continued the powers theretofore given the Director without disapproval of the regulations issued.

The Director of the Veterans' Bureau then issued Regulation 3140, as we are advised, in May, 1930.

With knowledge of these regulations and the Bureau's interpretation of the laws granting insurance and the purposes of Congress, by Act approved July 3, 1930, Congress again amended the World War Veterans' Act, Section 5, prescribing the general powers of the director, to make his decisions on questions of law, as well as of fact, conclusive, except as otherwise provided in the Act. (See 38 U. S. C. A., 426, 1933 Cumulative Supplement.)

Likewise, by this same Act of July 3, 1930, Section 301, paragraph 3, of the World War Veterans' Act was amended, but authority to make such other provisions from time to time, by regulation, for the protection and advantage of the insured, as may be found to be reasonable and practicable, was retained.

By another Act adopted the same date, July 3, 1930, the Veterans' Administration was provided for, and all the power and authority of the Director of the United States Veterans' Bureau was conferred and vested in the admin-

istrator of Veterans' Affairs; and nothing is shown in this Act as disapproving the regulations of the Director.

Likewise, with knowledge of the Bureau's interpretation of the term "total permanent disability," contained in Sect. 400 of the War Risk Insurance Act of 1917, this general term was retained in Sect. 300 of the World War Veterans' Act, 1924, and the subsequent Acts of March 4, 1925, (43 Stat. at L. 1302, 1308); July 2, 1926, (44 Stat. at L. 790, 798); and May 29, 1928, (45 Stat. at L. 964, 967), amending and re-enacting this section without change or limitation to show disapproval of the Bureau's interpretation.

The Veterans' Bureau has interpreted and construed veteran legislation providing for insurance in accordance with the regulations here discussed for a period of nearly fourteen years. Clearly, the interpretations placed upon veteran legislation by the Director of the Veterans' Bureau, and the regulations issued pursuant thereto, have received legislative sanction and should not be overturned.

See:

United States v. *John Bailey*, 9 Peters 238, 256, 11 Curtis 341, 345;

Johnson v. *Manhattan R. Co.*, 289 U. S. 479, 500, 77 L. Ed. 1331, 1346;

National Lead Co. v. *U. S.*, 252 U. S. 140, 146, 64 L. Ed. 496, 499, 500.

See also decisions of this Court cited on page 13.

Authorized regulations relative to war risk insurance form part of the contract, and are binding on both the Government and the insured. They have the force of law and are binding on the courts.

White v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530;

U. S. v. *Cole*, 45 F. (2d) 339 (C. C. A. 6);

Ross v. *U. S.*, 49 F. (2d) 541 (C. C. A. 5);

Bartee v. *U. S.*, 60 F. (2d) 247 (1) (C. C. A. 6).

The amendment to Regulation No. 1115, quoted by the Circuit Court of Appeals as the regulation itself, and Regulation 3205, quoted in the Appendix to respondent's memorandum to this Court, do not militate against the conclusion that the Veterans' Bureau, now Veterans' Administration, has properly applied statutory disabilities to war risk and converted insurance and that its action has received legislative sanction. (Regulation 1115, quoted in Appendix, p. 32.) We base this asertion on the following reasons:

(a) Congress, in declaring that the specific losses enumerated shall be deemed total permanent disability, did not fix any standard by which such disability shall be so deemed to result, but declared total permanent disability to so result without qualification or limitation, and left to the Bureau no discretion but merely the duty to find whether or not the claimant has suffered the specific losses mentioned. Whereas, in providing compensation for other disabilities, up to and including total permanent disability, other than statutory, Congress did fix a standard by which the administrative agency should measure the disabilities found, which was the impairment in earning capacity, resulting from such injury to the average man, in civil occupations.

(b) The Veterans' Administration has retained Regulations 3122 and 3140 expressly making the statutory total permanent disabilities total permanent disability under insurance contracts, which demonstrates that there has been no departure from the Bureau's interpretation of the statute, adhered to through these many years as far as the statutory disabilities are concerned. The modification in the regulations clearly affects only those cases in which the Veterans' Bureau, now Veterans' Administration, is left to determine the effect of diseases or losses suffered other than those declared by Congress to constitute total

permanent disability, as they are the only class of cases in which a standard is provided for the Bureau in determining the existence of total permanent disability.

(c) The regulations and the express terms of the published life policy, insofar as they declare the specific disabilities enumerated in the amendatory Act of December, 1919, and subsequent Acts, total permanent disability under insurance contracts, have never been disapproved by any court prior to the instant case, so far as we have been able to find, but, to the contrary, have received judicial sanction.

(3) **Sufficiency of the Evidence.**

The evidence and the fair inferences therefrom show:

Petitioner lost his right arm above the elbow on October 26, 1918, during which time his insurance was of force by payment of premiums. At the same time he had only one-tenth vision in his left eye and could see only the outline of large objects. His eye condition could not then be corrected. He had lost the use of his left eye. (See *Pan-American Life Insurance* v. *Terrell*, 29 F. (2d) 460 (C. C. A. 5), and cases there cited so holding.)

He was right-handed before he lost his right arm. He is not a highly educated man, having gone only as far as the third year in high school. He could not follow his former employment because of his disabilities. He gave up his training course on advertising because his health got bad. The jobs he procured were given him out of sympathy and were of a temporary nature, or given him on a commission basis, or on a basis the employer was to pay him whatever he might determine he was worth. The jobs to which there was any fixed remuneration attached he had to give up because of his disabilities. He has no talent for sales jobs

and could not make anything at such work. He tried diligently to get other employment, but could not, in competition with others who had two hands and two good eyes. By his efforts over a period of years he was able to make only $405. The loss of an eye and an arm on opposite sides of the body is much more disabling than the loss of an eye and an arm on the same side of the body. Because of the difficulty of co-ordination between an eye and a hand on opposite sides, the medical witness testified, in his opinion petitioner was totally disabled.

Certainly this is substantial evidence to prove him totally disabled, which was the only issue in the case. Is there any better evidence that a man is unable to follow a substantially gainful occupation than the proof that he tried various jobs and lost them because of his handicap? Can there be more definite proof that a man is unable to obtain employment in competition with others than diligent effort to obtain employment over a period of years and failure because of his disabilities? Is there more effective proof that a man is disabled to follow a gainful occupation than the proof of trial over a period of years resulting in the meager earnings of $405 in more than fourteen years? Is it not indulging in pure speculation in behalf of defendant for the court to say, under the evidence, that this man is able in spite of his disabilities to follow substantially gainful employment?

The ability to get employment, as well as the ability to do the required work after employment, is an important factor in determining whether one is totally disabled.

> "Evidence that insured suffered from recurrent skin disease, which rendered him unable, because of his appearance, to obtain employment, sustained finding of total permanent disability under war-risk policy."
>
> *United States* v. *Raues*, 48 F. (2d) 582 (2).

> "Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of sound mind and average attainments under the usual conditions of life."
>
> *United States* v. *Cox*, 24 F. (2d) 944, 946.

This Court held in *Gunning* v. *Cooley*, 281 U. S. 90, in determining a motion of either party for a peremptory instruction, the court assumes that the evidence of the opposing party proved all that it may reasonably be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them, and that the credibility of witnesses and the weight to be given to their testimony are for the jury.

From an examination of the opinion of the Circuit Court of Appeals in this case it is apparent that the court did not draw, in favor of petitioner, all the inferences fairly deductible from the facts proven. The Circuit Court of Appeals apparently disregarded the eye disability and considered it of no handicap. The court was apparently determining the credibility of the witness rather than the fair inferences from the facts proven as to the disability resulting. The court apparently determined the weight to be given to the witnesses' testimony in the light of the circumstance that the eye had been defective from birth. However, we submit that the evidence does not show that the insured's eye was as totally defective at birth as it was at the time of his injury in October, 1918. This Court may take judicial notice of the fact that persons are not admitted to the Army when one eye is so defective, and from this it is presumable that petitioner's eye was not so defective even in 1917, when he enlisted.

Likewise, the Circuit Court of Appeals, in determining the effect of the eye deficiency, disregarded the medical

testimony as to the increased difficulty of directing the work of a hand on the opposite side from the eye. Further, the Circuit Court of Appeals determined the credibility of petitioner's testimony that he tried diligently to get employment but could not in competition with others with two good hands and two good eyes as shown from the statement in the opinion: "Having no dependents and $90 a month compensation, he was under no necessity to work." There is no evidence in the record to show whether or not petitioner had dependents, and we are at a loss to understand how the Circuit Court of Appeals so concluded. As a matter of fact, petitioner was married and had a wife dependent on him.

The circumstance of long delay before bringing suit unexplained may, in some cases, affect the credibility of insured's testimony; but this is a matter for the jury. To make it controlling would be to defeat by rule of evidence the limitation period fixed by Congress.

However, while through inadvertence, plaintiff's explanation of his delay was omitted from the brief of evidence, he did in fact explain his delay. He was asked the question, why he did not make application for disability benefits until some time in 1931; and he answered that it was attributable more to ignorance than anything else; that he thought a man had to die to get that insurance; that he thought it was straight life insurance.

In view of the tremendous weight given by this Court in the case of *Lumbra* v. *United States,* 290 U. S. 551, to the failure to explain the long delay in claiming the insurance benefits, and to correct as far as possible an inadvertence on our part, we have asked the District Attorney to certify to the question and the answer of the insured on this particular point, which the District Attorney very promptly did, and his certificate appears in the Appendix on page 33.

When it is remembered that in the case of yearly renewable insurance no policy was issued to the insured, and the average insured had little opportunity to know the law and practically no opportunity to know the regulations which constituted his policy, as these were not published in form available for the general public, it is not surprising that many veterans were ignorant of their rights for a long time and took no action to protect them. Certainly, Congress considered there were meritorious claims that had not been presented and good reason for delay when it extended the time for making claim and bringing suit.

Pure ignorance of his rights under the contract and the law accounts for the delay in this case.

The trial court accepted as proven the loss of the use of the left eye and the right arm. There was no suggestion at the trial of the case that the insured had not lost the use of his eye to the extent testified—the time of the loss was the factor urged. The view that the eye loss did not handicap was first urged and given credence in the appellate court, when, construing the evidence most liberally in favor of the Government, contrary to the established rule in such cases, it was concluded that the eye deficiency had existed always and had never handicapped plaintiff.

This Court may take judicial notice of the scientific fact, established by experience in the examination of thousands of school children, that a person may be entirely ignorant of the existence of a severe eye deficiency, and that the deficiency was in fact a serious handicap, and when corrected the person's work promptly and materially improved. Even proof that the eye was defective always does not prove that it did not handicap. Further, the insured was right-handed before his injury; naturally, his right arm and hand were the primary working members, and the left hand the secondary assistant. The right eye directed the

work of the right arm, which normally was mostly in the field of vision of the right eye. However, when the left hand and arm were called upon to do the entire work, much of it must be done out of the normal field of vision, or in a less efficient area of the normal field of vision of the right eye, and, naturally, there is a serious increase in the handicap.

Common sense supports the testimony of the eye specialist, and certainly he is the person best fitted to testify as to the co-ordination between eye and muscles and the control of the eye over the arms and hands, and the handicap resulting from the loss of that co-ordination and control. It is his opinion that the insured in this case is totally disabled and was so in October, 1918.

Certainly Miller had lost the use of his left eye within the meaning of the insurance contract and the statute. It was clearly of no practical value in the performance of work for compensation, and undoubtedly a complete loss so far as earning capacity is concerned, which is really the test of usefulness or loss in these cases.

We submit that there is no such thing as judicial notice that a one-eyed one-armed man is not totally and permanently disabled. If the court is to look to its own observations as to one-armed one-eyed men at work, we ask the court with all sincerity whether it can say such men gain their places in competition with others as a gratuity from some close sympathetic friend or relative; can it say whether such men it may know were of limited training and capability on a parity with this man, or are they men who have peculiar and exceptional talent or genius? Because men with one eye and one hand have been known to work and exist does not prove that they were substantially employed. Most likely they were employed for a mere pittance and their earnings augmented by the charitable dona-

tions of relatives or friends. We do know it is unreasonable that men will employ one so disabled when there are, always have been, and always will be men with two good arms and two good eyes seeking work, except it be as a gratuity to help a close friend or relative, or the man has some peculiar talent in which his worth lies that is not impaired by his dismemberment. The fair inference from the evidence is that this man possesses no such talent.

We submit that under the evidence in this case a jury could have properly found a verdict for petitioner, and that he has been deprived of his constitutional right of a jury trial.

Respectfully submitted,

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

APPENDIX.

Section 400, War Risk Insurance Act of 1917.

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums hereinafter provided.

38 U. S. C., Sect. 473—Relevant part:

Disability resulting from injury; total and permanent disability; loss of both eyes; loss of use of both eyes and one or more limbs; tubercular ex-service men. If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: Provided, however, That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: Provided further, That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: Provided further, That for double total permanent disability the rate of compensation shall be $200 per month.

War Risk Regulation 57—Relevant parts:

IV. For compensation purposes a disability from injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz: "Loss of both feet or both

hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously any substantially gainful occupation and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

(c) When a presumption of total permanent disability is established under the following conditions: * * *

VII. Upon a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with provisions of Paragraph IV above. Such awards may be made retroactive to the date of the commencement of such total permanent disability if the case falls within the provisions of subparagraph (a) or (b) of Paragraph IV above, or to the date of the commencement of the period during which the person is presumed to be permanently and totally disabled if the case falls within subparagraph (c) of Paragraph IV above.

Awards of total permanent disability under the contract of converted insurance shall be governed by the terms and conditions of the converted policy.

IX. Regulation 54 is hereby revoked and all other bulletins, Treasury decisions, or regulations in conflict with this regulation are modified accordingly.

United States Veterans' Bureau Regulation No. 4, Division B:

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, "Loss of both feet or both

hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously a substantially gainful occupation, and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

VII. On a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with the provisions of Paragraph IV above. Such awards shall be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of said paragraph.

X. Bureau of War Risk Insurance Regulation 57 is hereby revoked and all other bulletins, Treasury decisions or regulations in conflict with this regulation are modified accordingly.

Regulation 3122:

Statutory total permanent disabilities. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Letter:

Washington, April 25, 1934.

In Reply Refer to: CC-A.

Mr. Jas. A. Lowrey, Jr.,
c/o Miller & Lowrey,
Attorneys at Law,
Macon, Georgia.

DEAR SIR:

Your letter dated April 13, 1934, addressed to Mr. E. Julian Peacock, Clerk, Committee on Naval Affairs, House of Representatives, Washington, D. C., relative to your desire to secure a compilation of the regulations of the Veterans' Administration, and if there is no such printed compilation, then requesting specific information relative to the effective date of Paragraph R-3140, Regulations and Procedure, Veterans' Administration, has been referred by Honorable Carl Vinson, House of Representatives, Washington, D. C., to this Administration for attention.

The Regulations and Procedure of the Veterans' Administration is a loose-leaf compilation consisting of sections pertaining to Adjudication, Adjusted Compensation, Finance, Supply, Insurance, Legal, Medical, etc. Only sufficient copies of this loose-leaf compilation were printed to meet the needs of the employees of the Veterans' Administration, except copies have been furnished to other Federal agencies and to accredited representatives of recognized veterans' and welfare organizations. This loose-leaf compilation is not published as a public document and cannot be purchased.

Paragraph 3140 of Regulations and Procedure was first incorporated in this loose-leaf compilation at the time it was originally prepared and when distributed in May, 1930, was accompanied by a memorandum over the signature of the then Director of the United States Veterans' Bureau containing the statement: "This Insurance portion amends and supersedes all other Regulations, General Orders, Circulars, and other instructions issued prior to March, 1930, as conflict therewith wholly or in part." The language that

was incorporated in this Paragraph R-3140 was taken from the insurance policy contract.

Public No. 90, 65th Congress, approved October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been modified from time to time until these statutory permanent total disabilities are those listed in the paragraph above referred to. While said statutory permanent and total disabilities as contained in the law are with reference to the payment of compensation, the Veterans' Administration adopted the policy of making these same disabilities the basis of awarding insurance for permanent and total disability for both term insurance and converted insurance purposes. In the World War Veterans' Act, 1924, as amended, the provision for statutory permanent and total disabilities is contained in Section 202 (3). As stated above this provision first appeared in the Act of October 6, 1917, and has been amended by amendatory Acts dated June 25, 1918, August 6, 1919, December 24, 1919, June 7, 1924, and July 2, 1926.

It is noted you have a copy of Senate Document No. 131, 72nd Congress, 1st Session, "Federal Laws Relating to Veterans of Wars of the United States," already in your possession. On page 132 thereof under Section 463 you will find a historical note relative to Section 202 (3) of the World War Veterans' Act, 1924, as amended.

Yours very truly,

JAMES T. BRADY,
Acting Solicitor.

Telegram of Solicitor, Veterans' Administration:

1934 Dec 19 PM 12 46

QB198 71 Govt—Washington DC 19 1217P

Miller & Lowrey
Attorneys Macon Ga

Re tel to Honorable Carl Vinson from March eighteen nineteen nineteen date Treasury Decision four two War

Risk Government life insurance policies contained provisions for maturity as total and permanent disability claim if insured suffered entire and irrecoverable loss of sight of both eyes and other specific disabilities stop Changes were made in policies from time to time to conform with changes in law defining said specific disabilities as total and permanent.

Brady Solicitor

Regulation 1115:

Permanent Total Ratings for Compensation Purposes.

1115. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(A) *Statutory.*—When a statutory permanent total disability entitles a person to such rating, viz: "Loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden."

(B) *When Shown by Evidence.*—When from the evidence submitted it is determined that there is present any impairment of mind or body which continuously renders it impossible for the average man to follow any occupation similar to that of the disabled veteran at the time of enlistment and which is founded upon conditions which render it reasonably certain that it will continue throughout the lifetime of the person suffering from it. The impairment in earning capacity in each individual case will not be considered so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. In arriving at a decision the average impairment in ability to secure employment, which results from the service connection injuries, will be considered.

Furthermore permanent and total disability may be conceded in a proper case where there are present two or more

disabilities, affecting entirely different functions, one of which is 65 per cent disabling and which combined by present methods to 85 per cent. These evaluations, however, upon which permanent and total disability may be conceded are not intended to be rigid unalterable standards. They are cited as illustrative and to be used as guides.

A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa. (March 2, 1931.)

Regulation 3140:

Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Certificate of District Attorney:

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 342.

MADISON L. MILLER, JR., Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

I, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, do certify that the above-captioned case

was tried in the District Court of the United States for the Middle District of Georgia at Macon, before Judge Bascom S. Deaver and a jury, on the 10th day of July, 1933. The evidence adduced at the trial was taken down stenographically by Mr. Alton L. Watson, a court reporter employed by the Government.

The trial resulted in a directed verdict for the Government. Plaintiff applied for and obtained an order authorizing the prosecution of an appeal *in forma pauperis*. The evidence adduced at the trial was not written out, for the reason given by plaintiff's counsel that plaintiff did not have the money to pay for a transcript of the evidence. The brief of evidence incorporated in the bill of exceptions was prepared by plaintiff's counsel from their recollection of the testimony.

At the trial of the case, as shown by the stenographic notes of Reporter Alton L. Watson, counsel for plaintiff propounded to plaintiff the following questions:

> "Q. Why is it you did not file any application for disability benefits until some time in 1931, I believe it was?
>
> "A. That is attributed more to ignorance than anything else. I thought a man had to die to get that insurance."
>
> "Q. You thought he had to die?
>
> "A. Yes, sir, I thought it was straight life insurance."

This certificate is given at the request of plaintiff's counsel for the purpose of being embodied in the Appendix to the brief of counsel for Madison L. Miller, Jr., in the Supreme Court of the United States, subject, however to the approval of the Solicitor-General of the United States or other counsel representing the Government in said case in the Supreme Court of the United States.

This December 21, 1934.

T. Hoyt Davis,
United States Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 342

MADISON L. MILLER, JR., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 22–27) is reported in 71 F. (2d) 361.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1934 (R. 27). The petition for a writ of certiorari was filed September 4, 1934, and a motion to proceed in *forma pauperis* was granted October 15, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judi-

cial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the evidence in a war-risk insurance suit fails to establish the existence of a total permanent disability in fact, is the insured entitled to recover if he can show anatomical or functional losses sufficient to create a presumption of total permanent disability for compensation purposes under the provisions of subdivision 3, Section 202, World War Veterans' Act, as amended.

2. Is a regulation making the provisions of the above section applicable to insurance awards authorized by law?

3. Did the trial court properly direct a verdict for the United States in this case?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 12–15.

STATEMENT

The petitioner brought suit on April 5, 1932, in the District Court of the United States for the Middle District of Georgia to recover total permanent disability benefits under a contract of war risk term insurance issued to him during his service in the United States Army (R. 1–3). While it was admitted that no premiums had been paid since petitioner's discharge, April 3, 1919 (R. 1–2), it was alleged that the petitioner became totally and permanently disabled on October 26, 1918, as a result

of injuries sustained in the wreck of a troop train in France (R. 2). The loss of the right arm and of the sight of the left eye were alleged (R. 2), but from the evidence adduced at the trial it appears that the petitioner's vision had been defective since birth (R. 15). This condition while permanent had apparently not disabled him, or even been noticed by him, prior to the time he received the injury which resulted in the loss of his right arm (R. 12, 23, 26). Neither was it mentioned in his application for life insurance in 1919 after his discharge from the service (R. 14).

Before entering the Army the petitioner had received the equivalent of three years of a high-school education and had worked as a practical engineer engaged in surveying (R. 12–13). Except for the loss of his right arm and the defective vision in his left eye, his health has always been good (R. 14, 23).

Since his discharge from the Army petitioner has received from the Government an average of about $90.00 per month as compensation, but had earned by his own efforts only $405.00 (R. 15). The petitioner testified to having attempted unsuccessfully to pursue several forms of employment, but in some instances the work was of a character incapable of being accomplished by a one-armed man, and he abandoned employment as a salesman on other occasions because he found he had no talent for the work (R. 13–14).

A medical witness, who qualified as an eye specialist, testified that petitioner's vision in his left

eye was only about one-tenth of normal, but that if the sight of the right eye should be lost there would be sufficient vision in the left eye to enable the petitioner "to get around." The witness expressed the opinion that the petitioner was under a special handicap, because he had to direct his left hand with his right eye, and stated that he did not know of any gainful occupations that petitioner could follow (R. 15–16). The only other witnesses for the petitioner testified merely to having witnessed the train wreck and petitioner's injuries therein (R. 16).

Upon conclusion of the petitioner's evidence the trial court directed a verdict for the United States (R. 17). An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, in which court the contention was made for the first time that, irrespective of the existence of total permanent disability in fact, recovery should have been allowed under subdivision 3 of Section 202, World War Veterans' Act, as amended (*infra,* p. 13), and pursuant to Veterans' Administration Regulation No. 3140 (*infra,* p. 14), which adopted for insurance awards the provisions of Section 202 that certain anatomical and functional losses, among them the permanent loss of the use of one hand and one eye, should be deemed for compensation purposes to be total permanent disability.

The Circuit Court of Appeals held the statutory provision not applicable on the ground that it related solely to compensation and also ruled that

Regulation No. 3140 was not binding on the courts as it constituted "a modification or enlargement of the insurance contract" provided for by Congress (R–25). It was also held that, "Regulations aside, the evidence did not warrant a finding of total permanent disability", as the petitioner was not totally disabled in fact (R–25).

DISCUSSION

In *Lumbra* v. *United States*, 290 U. S. 551, 558–560, this Court indicated that it was of the view that the Congressional authorization for war-risk insurance against "total permanent disability" contemplated that the condition must exist in fact to warrant payment of the benefits provided.

The petitioner herein contends for an enlarged liability to include what may be termed presumptive total permanent disability. His contention is bottomed on the statutory provision that loss of certain members or functions shall constitute total permanent disability for compensation purposes.[1]

---

[1] The War Risk Insurance Act of October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been enlarged from time to time so that statutory total permanent disability for compensation purposes is now allowed for "the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden

It is, therefore, urged by him that since he suffered the amputation of his right arm in October 1918 while his insurance was in force and at that time also had an impaired vision in one eye, his case is controlled by the statutory provision which included among the conditions enumerated the permanent loss of the use of one hand and one eye. That this contention is clearly without merit is evident from the following quotation from the opinion of the Circuit Court of Appeals (R. 25):

> The statutory provision * * * has no application to War Risk Insurance. It was an amendment to a section in Art. III of the Act of 1917 relating to compensation for disabilities contracted in the line of duty, and reappears in Part II of the Veterans Act of 1924 devoted to that subject. Separate parts of both statutes are devoted to the contract of insurance, where the disability insured against may arise at any time or from any source. The statutory provision refers also to "double total permanent disability" for compensation purposes, whereas there could be no such thing for insurance purposes. Things that Congress has directed shall be deemed total permanent disability as respects the compensation benefits volun-

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* * *." The enlargements of this provision are contained in the amendatory Acts of June 25, 1918; August 6, 1919; December 24, 1919; June 7, 1924; and July 7, 1926. For a complete legislative history of the provisions, see "Federal Laws Relating to Veterans of Wars of the United States" (annotated), 72d Congress, First Session, Report No. 131, p. 132.

tarily bestowed by the Government do not fix the Government's legal liability on its insurance contracts.

Petitioner also relies upon Veterans' Administration Regulation 3140 which provides that the anatomical and functional losses enumerated in the statute dealing with compensation shall likewise constitute total permanent disability for war risk insurance purposes. The Circuit Court of Appeals held the regulation not binding in litigation on war risk insurance on the ground that it constituted an unauthorized modification or enlargement of the insurance contract.

This view we believe to be correct. In addition to the reasons expressed in the opinion of the Circuit Court of Appeals indicating that Congress did not intend to vest the Director with authority to enlarge by regulation the Government's liability for insurance against permanent and total disability, it may be pointed out that when the War Risk Insurance Act of October 6, 1917, was being considered by Congress the House Committee having charge of the Bill struck out a clause originally contained in Section 402 which would have provided that "rights and privileges not provided for may be granted from time to time as may be prescribed by regulations." See H. R. Report No. 130, Part 3, 65th Congress, First Session.

A Veterans' Bureau regulation which, as in the one involved here, provided for insurance awards of total permanent disability in cases not neces-

sarily involving such disability in fact, was held invalid by the Comptroller General of the United States on the ground that it exceeded the legal authority of the Director. 1 Decisions Comp. Gen. 31. The regulation there in question sought to establish permanent and total disability in insurance cases conclusively by lapse of time alone without regard to the actual facts. Concerning this regulation, the Comptroller General said (p. 32):

> * * * Any general regulation of the matter, however, must under the terms of the statute be not inconsistent with its provisions, so that in my opinion any such regulation which undertakes, for instance, without specific authority of law, to establish a general rule for rating total permanent disability upon mere lapse of time and without regard to whether the applicant was in fact totally and permanently disabled, is contrary to law and therefore of no effect as a general regulation * * *.

The decision further said (p. 32):

> As regards the application of these regulations to the payment of insurance the situation is not materially different. The insurance provided for by section 400 of the act of October 6, 1917, 40 Stat. 409, is payable only in case of death or "total permanent disability", and may not lawfully be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the bureau. As in the case of compensation the director

> is authorized and empowered by law to decide when a condition of permanent total disability exists. The same legal restriction upon his power to make general regulations which applies to compensation applies with equal force to insurance, and I cannot approve a regulation which undertakes to establish conclusively by lapse of time a condition of permanent disability which can be determined to exist only by competent medical opinion based upon the facts of any given case.

This decision was reaffirmed by the Comptroller General in 2 Dec. Comp. Gen. 99.

That the Congress concurred in the Comptroller General's ruling as to the illegality of such a regulation seems implicit in the fact that Section 27 of the World War Veterans' Act of June 7, 1924, validated payments made under awards disapproved by the ruling of the Comptroller General, but did not provide that any future payments might be made, and this action was taken upon submission by the Bureau to Congress of the facts relating to the regulation in question. Reference to the situation was contained in House Report No. 763, pp. 3, 12, and Senate Report No. 397, pp. 2, 6, 68th Congress, First Session.

It may be suggested in this connection that had Congress not concurred in the ruling of the Comptroller General, it could very well have provided by the same amendatory legislation that the Director should be empowered to promulgate such a

regulation as was held invalid, and the failure of Congress so to do is to be taken as evidencing a contrary intent. *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169.

Because there is some indication in the opinion of the court below that the evidence may have been regarded as not tending to establish the loss of eyesight contemplated by the regulation (R. 25–26), a view may be taken of the case that the decision insofar as it relates to the invalidity of the regulation is *dictum*. If that be so, then there is presented only the question whether there was evidence warranting submission of the case to the jury, a question which, of course, would not justify review here. But the opinion is also susceptible of the interpretation that the court felt it necessary to pass upon the validity of the regulation because it considered that there was merit in the contention of the petitioner that his disability came within the purview of the regulation. To us this seems the more reasonable interpretation of the opinion, and in this light it cannot be said that the case is not of sufficient importance to warrant review on writ of certiorari. A provision similar to the regulation involved is contained in converted insurance contracts, of which there are some 600,000 in force (see Regulations 3122, *infra*, p. 14), and we are informed that the Veterans' Administration is continuing to apply these regulations for the purposes of administrative adjudication and awards, both in term and converted insurance cases.

For the reasons stated we do not oppose the granting of the petition.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WILL G. BEARDSLEE,
Director Bureau of War Risk Litigation.
RANDOLPH C. SHAW,
Special Assistant to the Attorney General.
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NOVEMBER 1934.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C. Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918,[1] "permanent and total disability" was defined as follows:

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[1] This regulation was promulgated by the Director of the Bureau of War Risk Insurance pursuant to the authority contained in Section 13 of the War Risk Insurance Act (added by Section 2 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 399).

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Section 202 (3) of the Act of July 2, 1926, c. 723, Sec. 9, 44 Stat. 790, 794 (U. S. C., Title 38, Sec. 473), provides in part as follows:

> If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: *Provided, however,* That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: *Provided further,* That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: *Provided further,* That for double total permanent disability the rate of compensation shall be $200 per month.

Section 202 (4) of the Act of June 7, 1924, c. 320, 43 Stat. 607, 618 (U. S. C., Title 38, Sec. 477), dealing with compensation for disabilities attributable to military service, provides:

* * * * *

> A schedule of ratings of reductions in earning capacity from injuries or combinations of injuries shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. * * *

Regulation 3140 of the Veterans' Administration provides as follows:

> Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance, or any of these specifically enumerated causes of total permanent disability, shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Regulation 3122 makes exactly similar provisions with respect to United States Government life insurance.

Regulation 3205 of the Veterans' Administration provides as follows:

> RATINGS FOR INSURANCE BENEFITS NOT APPLICABLE FOR DISABILITY COMPENSATION OR DISABILITY ALLOWANCE.—Since decisions of the insurance claims' council determining the existence or nonexistence of total and permanent disability for insurance purposes and decisions of rating agencies determining the existence or the nonexistence of total and permanent disability for compensation or disability allowance purposes are based upon distinctly dissimilar standards, it follows that the former cannot be determinative for compensation or disability allowance purposes and the latter cannot be determinative for insurance purposes. (November 1, 1931.)

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 342

MADISON L. MILLER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 22–27) is reported in 71 F. (2d) 361.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1934 (R. 27). The petition for a writ of certiorari was filed September 4, 1934, a motion to proceed *in forma pauperis* was allowed October 15, 1934, and the petition was granted December 3, 1934. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the evidence in a war-risk insurance suit fails to establish the existence of a total permanent disability in fact, is the insured entitled to recover if he can show anatomical or functional losses sufficient to create a presumption of total permanent disability for compensation purposes under the provisions of subdivision 3, Section 202, World War Veterans' Act, as amended?

2. Does the law authorize the issuance of a regulation making the provisions of the statute relating to compensation applicable to insurance and retroactively effective?

3. Did the petitioner adduce substantial evidence of total permanent disability in fact?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 32–48.

STATEMENT

The petitioner brought suit on April 5, 1932, in the District Court of the United States for the Middle District of Georgia to recover total permanent-disability benefits under a contract of war-risk term insurance issued to him during his service in the United States Army (R. 1–3). While it was not contended that any premiums had been paid since petitioner's discharge, April 3, 1919 (R.

1–2), it was alleged that the insurance had matured by reason of the petitioner's total permanent disability on October 26, 1918, as a result of injuries sustained in the wreck of a troop train in France (R. 2). The loss by amputation of the right arm and of the practical sight of the left eye were alleged (R. 2), but from the evidence adduced at the trial it appears that the petitioner's eye had been defective since birth (R. 15). This defect in his vision, while permanent, had apparently not disabled him, or even been noticed by him, prior to the time he received the injury which resulted in the loss of his right arm (R. 12, 23, 26). Neither was it mentioned in his application for life insurance in 1919 after his discharge from the service (R. 14).

Before entering the Army the petitioner had received the equivalent of three years of a high-school education and had worked as a practical engineer engaged in surveying (R. 12–13). Except for the loss of his right arm and the defective vision in his left eye, there was no showing made but that his health was generally good, and in 1919 he so represented both in applying to the Government for compensation and in an application for life insurance (R. 14–15, 23).

Since his discharge from the Army, petitioner stated that he had received from the Government an average of about $90.00 per month as compensation, but claimed to have earned by his own efforts only $405.00 (R. 15). He also testified to having

received "about $2,500" as his share of the proceeds of certain lots which he and his brother subdivided and sold (R. 14).

The petitioner testified to having attempted unsuccessfully to pursue several forms of employment, but in some instances the work was of a character incapable of being accomplished by a one-armed man, and he abandoned employment as a salesman on other occasions because he found he had no talent for the work (R. 13–14). He also testified to having abandoned a vocational-training course in advertising offered him by the Government because of ill health while pursuing it (R. 14).

A medical witness, who qualified as an eye specialist, testified that petitioner's vision in his left eye was only about one-tenth of normal, but that if the sight of the right eye should be lost there would be sufficient vision in the left eye to enable the petitioner "to get around." The witness expressed the opinion that the petitioner was "totally disabled" because he had to direct his left hand with his right eye. While testifying that he personally did not know of any gainful occupations that petitioner could follow, the witness indicated that such a statement did not necessarily exclude all occupations, for he admitted that the petitioner "could manage a farm if he knew the farming business" (R. 15–16).

The only other witness for the petitioner testified merely to having witnessed the train wreck and petitioner's injuries therein (R. 16).

Upon the conclusion of the petitioner's evidence the trial court directed a verdict for the United States (R. 17). An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, in which court the contention was made for the first time that, irrespective of the existence of total permanent disability in fact, recovery should have been allowed under subdivision 3 of Section 202, World War Veterans' Act, as amended (*infra,* p. 34), and pursuant to Veterans' Administration Regulation No. 3140 (*infra,* p. 38), which adopted for insurance awards the provisions of Section 202 that certain anatomical and/or functional losses, among them the permanent loss of the use of one hand and one eye, should be deemed for compensation purposes to be total permanent disability.

The Circuit Court of Appeals held the statutory provision not applicable on the ground that it related solely to compensation, and ruled that Regulation No. 3140 was not binding on the courts as it constituted "a modification or enlargement of the insurance contract" beyond the Congressional authorization (R. 25). It was also held that, "Regulations aside, the evidence did not warrant a finding of total permanent disability", as the petitioner was not totally disabled in fact (R. 25).

ARGUMENT

I

CONGRESS HAS NOT PROVIDED BY STATUTE THAT TOTAL PERMANENT DISABILITY MAY BE PRESUMED FOR WAR-RISK INSURANCE PURPOSES WHERE SUCH CONDITION DOES NOT EXIST IN FACT

By the arrangement and emphasis of petitioner's brief it seems apparent that principal reliance is placed herein upon the contention that, irrespective of the existence of total permanent disability in fact, such a condition is to be presumed, and recovery of insurance disability benefits allowed, if the insured can show functional and/or anatomical losses sufficient to bring his case within the provisions of subdivision 3 of Section 202, World War Veterans' Act, as amended, and the Veterans' Administration regulations making such statutory provisions mandatorily applicable to all insurance awards.

The court below rejected such a contention on the ground that the Congressional authorization for insurance against total permanent disability contemplated that benefits would be payable only in the event that the insured was in fact so disabled.

The decision rendered accords, we believe, with the view indicated by this Court in *Lumbra* v. *United States,* 290 U. S. 551, 558–560, that the statutory phrase "total permanent disability" requires consideration of the circumstances of each case. At the same time it was stated in the *Lumbra* opinion that—

> The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to prevent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the Act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative, occupations. Frequently serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

Cf. *United States* v. *Green,* 69 F. (2d) 921, 922 (C. C. A. 8th); *United States* v. *Cornell,* 63 F. (2d) 180, 181 (C. C. A. 8th); *Roberts* v. *United States,* 57 F. (2d) 514 (C. C. A. 10th); *Nalbantian* v. *United States,* 54 F. (2d) 63, 65 (C. C. A. 7th), certiorari denied, 285 U. S. 536; *Barksdale* v. *United States,* 46 F. (2d) 762 (C. C. A. 10th).

The contention advanced by the petitioner herein is at variance with several principles expressed in the above quotation. There is urged, for example, the approval of a fixed rule uniformly to govern the determination of total permanent disability in cer-

tain cases. In many cases such a rule would disregard the fact that the insured, while seriously handicapped by injury or disease, could nevertheless follow a substantially gainful occupation. Adopting the phraseology of the court below, the contention of the petitioner (R. 25)—

> * * * if sustained, would cause an insurance policy to mature, not upon total permanent disability, but upon a one-eyed man's losing his leg, or a one-armed man's losing an eye, or the like, regardless of the effect of the loss on his earning capacity.

Petitioner argues that such a result as that described was nevertheless the intention of the Congress. To support this contention he relies primarily on the statutory provision that loss of certain members and/or functions shall constitute total permanent disability for compensation purposes.[1]

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[1] The War Risk Insurance Act of October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month". This provision has been enlarged from time to time so that statutory total permanent disability for compensation purposes is now allowed for "the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden * * *." The enlargements of this provision are contained in the amendatory Acts of

It is therefore urged by him that, since he suffered the amputation of his right arm in October 1918, while his insurance was in force and at that time also had impaired vision of one eye, his case is controlled by the statutory provision which included, among the conditions enumerated, the permanent loss of the use of one hand and one eye.

But the statutory provision relied upon manifestly has no application to insurance. In the World War Veterans' Act and in the other Acts this provision has always been included only in the Article or Title governing compensation. Insurance provisions are, and have been, dealt with under a separate Article or Title and between the two forms of benefits provided there is a fundamental difference which has been clearly pointed out by the Circuit Court of Appeals for the Tenth Circuit in *Runkle* v. *United States*, 42 F. (2d) 804. It was therein said, at page 806:

> Disability under a war risk insurance policy is a different thing than disability under the compensation statutes. Disability under a war risk insurance policy is such "impairment of the mind or body as renders it impossible for the assured to follow continuously any substantially gainful occupa-

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June 25, 1918; August 6, 1919; December 24, 1919; reenacted as Section 202, World War Veterans' Act, June 7, 1924, and amended July 2, 1926. For a complete legislative history of the provisions, see "Federal Laws Relating to Veterans of Wars of the United States" (annotated), 72d Congress, First Session, Senate Report No. 131, p. 132.

> tion." War risk insurance deals with the individual case, and with "any" occupation. Disability under the compensation statute, on the other hand, deals with "average impairments", and with inability to follow a pre-war occupation. Title 38, U. S. C. A., § 477, defines disability ratings for the purposes of compensation as follows: "The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury."

See also *United States* v. *Golden*, 34 F. (2d) 367, 369 (C. C. A. 10th), and *United States* v. *Thomas*, 53 F. (2d) 192, 195 (C. C. A. 4th).

Congress, having thus provided wholly different standards for the ascertainment of benefit rights between compensation and insurance, cannot be presumed, in the absence of some clear expression warranting it, to have intended that a provision found only in the compensation title should be likewise applicable to insurance.[2] The context and

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[2] The Congressional intendment with respect to excluding provisions of the compensation title from application to insurance claims is especially clear when consideration is given to the presumption of service origin of disabilities contained in Section 200 of the World War Veterans' Act, as amended, 38 U. S. C. 471. In *Brandaw* v. *United States*,

purpose of subdivision 3, Section 202, we submit, is clearly to the contrary. Compensation alone is mentioned and provision is made for "double total permanent disability", which obviously could have no intended application to the insurance authorized.

Furthermore, it seems clear, from reference to subdivision 4 of the same section, that when the term "total permanent disability" is employed in Section 202 there must have been intended a different standard of disability than that applicable to insurance. The first paragraph of subdivision 4 provides that the compensation to be paid a veteran for permanent partial disability "shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability * * *." As compensation ratings are required by other provisions of the subdivision to be based upon the average impairment of earning capacity in civil occupations similar to that pursued by the veteran

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35 F. (2d) 181 (C. C. A. 9th), and in other cases this presumption was held applicable to war-risk insurance litigation. These decisions were brought to the attention of Congress and an amendment was made by the Act of July 3, 1930, which made it clear that Congress did not intend the compensation presumption to be held applicable to war-risk insurance. A full discussion of the legislation in question will be found in *United States* v. *Searls*, 49 F. (2d) 224 (C. C. A. 4th). See also *Meyer* v. *United States*, 65 F. (2d) 509 (C. C. A. 5th); *LeBlanc* v. *United States*, 65 F. (2d) 514 (C. C. A. 5th).

prior to enlistment, it is obvious that the base for partial ratings, namely, total permanent disability, must of necessity be governed by the same standard, for the total of a measure cannot be of different character than the gradations thereof.

It has been seen that Congress intended compensation to be payable irrespective of whether or not the veteran's post-war ability to earn had been affected. This, manifestly, is not the purpose of the total permanent disability provision of insurance.[3]

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[3] Judge Julian W. Mack, who was the principal author of the War Risk Insurance Act of October 6, 1917, made clear the distinction between compensation and insurance in an explanation which is published in "Regulations and Procedure, United States Veterans' Bureau" Part II, pp. 1241, 1254, and 1258. This explanation, it was stated by Director De Lanoy, had "the full approval of the Bureau of War Risk Insurance."

Discussing the compensation features of the Act Judge Mack said (p. 1254): "* * * it is expressly provided in this bill that the compensation which the Government gives him, let us say for the loss of his legs, is not going to be taken away from him because he has attained an even higher economic position than he had before the war. The compensation will be continued as long as the physical disability continues, regardless of the economic recuperation."

Later, discussing the insurance provisions of the Act, Judge Mack said (p. 1258): "Then, another provision that the Government generously added: While it based the premiums upon these extremely low term rates, it added this provision that not only on a man's death should the policy mature, but also on his becoming totally and permanently disabled. *This has nothing at all to do with the compensation provision.*" (Italics ours.)

The basic regulation, Treasury Decision 20, which, with minor and immaterial changes, has governed the ascertainment of total permanent disability for insurance purposes since its promulgation on March 9, 1918, is solely concerned with the matter of ability to follow any gainful occupation at the time when the incidence of the disability is claimed. Cf. *United States* v. *Thomas*, 53 F. (2d) 192, 195 (C. C. A. 4th).

This regulation in no wise can be said to embrace such a rule for determining total permanent disability as that provided in subdivision 3 of Section 202, *infra*, p. 34, for, as has been pointed out, a claimant entitled to the total permanent compensation benefits under that section might well be capable of pursuing a substantially gainful occupation and thus would not be within the provisions of Treasury Decision 20. Petitioner's argument that the regulation amounts to a long-standing administrative holding that total permanent disability is to be similarly construed for compensation and insurance purposes (Br. 12–13) is thus seen to be without merit, particularly as the regulation has been held not necessarily definitive of the statutory authority (See *Lumbra* v. *United States*, *supra*, and *United States* v. *Green*, *supra*, p. 921), although its general provisions have been frequently approved. See *United States* v. *Cornell*, *supra*, p. 181.

Furthermore, the Veterans' Administration has expressly ruled by Regulation 3205, *infra*, p. 38,

that because of the "distinctly dissimilar standards" governing compensation and insurance awards a decision as to one benefit is not determinative of the other.

Nor do the few cases cited by petitioner in which passing references have been made to Section 202 lend any authoritative support to the contention herein advanced that certain disabilities are conclusively to be presumed totally permanently disabling for, in each instance, the opinion expressly recognizes that total permanent disability is generally to be determined by the facts in the particular case and in no case cited did the court have before it for decision the question as presented herein. See *United States* v. *Rasar*, 45 F. (2d) 545, 547–548 (C. C. A. 9th); *Sorvik* v. *United States*, 52 F. (2d) 406, 411 (C. C. A. 9th); and *United States* v. *Law*, 299 Fed. 61, 64 (reversed on a jurisdictional question, 266 U. S. 494).

See also *Demeter* v. *United States*, 66 F. (2d) 188, 189 (App. D. C.), where it was said, "* * * it is settled law that total disability for purposes of compensation differs greatly from total disability for insurance * * *."

We believe that the foregoing conclusively disposes of any contention that Congress intended that the compensation provisions of subdivision 3, Section 202, were to govern insurance awards. If, then, it be concluded that the provisions of Section 202 are not to be held mandatorily determinative

of total permanent disability under insurance contracts, the question arises whether they can be so made applicable by administrative regulation.

II

NO CONGRESSIONAL INTENTION CAN BE IMPUTED TO AUTHORIZE ENLARGEMENT OF THE GOVERNMENT'S LIABILITY FOR DISABILITY INSURANCE BY A REGULATION PRESUMING TOTAL PERMANENT DISABILITY WHEN SUCH DISABILITY MAY NOT EXIST IN FACT

In the various Acts which have authorized war risk and Government insurance no attempt has been made to define its scope other than to provide that insurance should be granted against "death or total permanent disability." Authority was conferred upon the official charged with the administration of the law to make regulations not inconsistent with the purposes of the Act and to determine upon and publish the full and exact terms and conditions for the contracts of insurance made.

As the foregoing constitutes the only express statutory pronouncement respecting the character of the insurance authorized, the Congressional intendment concerning the liability to be assumed by the Government for the disability-insurance features must of necessity be ascertained from general principles inherent in the legislation.

The first inquiry naturally turns to the character of the disability for which Congress intended the insurance protection. Because provision had been made through the compensation features of the

legislation for the payment of benefits for disabilities of service origin, and it had been specifically directed that such benefits were to be payable irrespective of economic recuperation (which latter provision was not made applicable to the insurance authorized), it seems clear that Congress intended the disability insurance to provide indemnity solely against vocational inability rather than to duplicate the indemnifying provisions of the compensation benefits. This view finds support in the numerous court decisions which have held that where the insured has been able to follow a gainful occupation for a substantial period subsequent to the time of the alleged disability, it cannot be said that the requisite condition of the insurance has been met, even though the insured was suffering from a disability which might make it impossible for others to perform the work which he had proved himself capable of accomplishing. Cf. *Lumbra* v. *United States, supra; United States* v. *Green, supra* (p. 922); *Barksdale* v. *United States, supra* (p. 764); and *United States* v. *Law, supra* (p. 64).

In *United States* v. *Vineyard,* 71 F. (2d) 624, certiorari denied, No. 414, denied Nov. 5, 1934, the Circuit Court of Appeals for the Fifth Circuit, discussing certain previous decisions rendered, stated:

> We undertook in those cases to point out that disability insurance of this kind is in effect unemployment insurance, when that unemployment is the result of the contin-

> gency insured against—total and permanent disability. We held that such contracts are and must be liberally construed to give effect to their paramount purpose of supplying, to the extent of the policy payments, the living which the disability insured against has prevented the insured from earning. Under such a contract one may not be said to be totally disabled when the proof shows that without serious injury or danger to his health and life he has in fact for a long period of years made his living by working.

If it is thus to be assumed that the disability insurance was intended as stated in the decision quoted, to be unemployment insurance where the vocational incapacity flows from disability, it would necessarily follow that any regulation which would enlarge the liability of the Government beyond the character of insurance intended would be inconsistent with the statutory authority. Cf. *Nordberg* v. *United States,* 51 F. (2d) 271, 273 (D. C. Mont.).

We think it indisputable that Congress did not intend to vest in any administrative official the right to confer additional benefits or to enlarge those previously authorized, especially when it is considered that the disability provision of the insurance contract was wholly gratuitous in nature as premiums were required to be calculated only against mortality hazards. (See Section 402, 40 Stat. 409.) How costly has been the liability thus assumed by the Government is apparent from the

fact that the disbursements to June 30, 1933, for term and automatic insurance exceeded premium receipts by $1,166,939,057, a deficit largely attributable to the gratuitous disability features of the insurance. See Footnote 2 of the opinion in *Lynch* v. *United States,* 292 U. S. 571.

Presumably it was in recognition of the tremendous potential liability assumed by the Government in war-risk insurance and with the intention to reserve for Congressional determination alone any enlargement of such liability that the House Committee having charge of the original War Risk Insurance Act struck out the clause originally contained in Section 402 which would have provided that "rights and privileges not provided for may be granted from time to time as may be prescribed by regulations." See H. Rep. No. 130, 65th Cong., 1st Sess., part 3.

Congress has from time to time provided for the enlargement of the privileges granted and accorded new benefits (see *Lynch* v. *United States, supra,* particularly Footnote 4), but in each instance specifically conferred authority for the administration of the new benefits authorized.

As has previously been seen, the basic regulation, Treasury Decision 20, fully accords with the contention herein advanced that the disability insurance was of intended application solely to cases of individual vocational incapacity.

Generally speaking, the regulations which have been promulgated for the procedural application

of the principles incorporated in Treasury Decision 20 have been consistent with the statutory intendment as herein discussed, but in War Risk Regulation 57, effective November 26, 1920, these principles were departed from when attempt was made to provide for presumptive total permanent disability in both compensation and insurance cases where the claimant had been hospitalized for a period of six months or had been found temporarily totally disabled for such a period. (See Par. B IV (c) 1. Regulations and Procedure United States Veterans' Bureau, Part I, p. 55.)

This provision of the regulation was declared invalid by the Comptroller General of the United States, 1 Comp. Gen. 31. Discussing the regulation in question, the decision said (p. 32):

> Any general regulation of the matter, however, must under the terms of the statute be not inconsistent with its provisions, so that in my opinion any such regulation which undertakes, for instance, without specific authority of law, to establish a general rule for rating total permanent disability upon mere lapse of time and without regard to whether the applicant was in fact totally and permanently disabled, is contrary to law and therefore of no effect as a general regulation * * *.

The decision further said (p. 32):

> As regards the application of these regulations to the payment of insurance the situation is not materially different. The

> insurance provided for by Section 400 of the act of October 6, 1917, 40 Stat. 409, is payable only in case of death or "total permanent disability", and may not lawfully be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the bureau. As in the case of compensation the director is authorized and empowered by law to decide when a condition of permanent total disability exists. The same legal restriction upon his power to make general regulations which applies to compensation applies with equal force to insurance, and I cannot approve a regulation which undertakes to establish conclusively by lapse of time a condition of permanent disability which can be determined to exist only by competent medical opinion based upon the facts of any given case.

This decision was reaffirmed by the Comptroller General in 2 Comp. Gen. 99.

That the Congress concurred in the Comptroller General's ruling as to the illegality of such a regulation, seems implicit in the fact that Section 27 of the World War Veterans' Act of June 7, 1924, validated payments made under awards disapproved by the ruling of the Comptroller General, but did not provide that any future payments might be made, and this action was taken upon submission by the Bureau to Congress of the facts relating to the regulation in question. Reference to the situation was contained in H. Rep. No. 763,

68th Cong., 1st Sess., pp. 3, 12; and S. Rep. No. 397, 68th Cong., 1st Sess., pp. 2, 6.

It may be suggested in that connection that, had Congress not concurred in the ruling of the Comptroller General, it could very well have provided by the same amendatory legislation that the Director should be empowered to promulgate such a regulation as was held invalid; and the failure of Congress so to do is to be taken as evidencing a contrary intent. *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169.

The petitioner has sought to make a point of the fact that in both War Risk Regulation 57 and Veterans' Bureau Regulation 4, *infra*, provision was made that insurance awards might conform to the procedure outlined for compensation claims and take into consideration the specific disabilities which, for compensation purposes, would constitute statutory total permanent disability. Because these regulations were in effect from November 1920 until Regulation 3140 was promulgated in May 1930 he contends that Congressional sanction for the latter challenged regulation may be implied (Br. p. 18).

But it is overlooked by petitioner that in both War Risk Regulation 57 and Veterans' Bureau Regulation 4 no mandatory application of the presumptive compensation provision was required in insurance cases. Both regulations employed the word "shall" in the section which provided that total permanent disability should be presumed in

compensation claims where the disabilities enumerated by the statute were present, and we believe it to be highly significant that the word "may" was used in that portion of the regulations where application was suggested for insurance awards. It is also to be noted that the insurance paragraph of the regulation was qualified by the phrase "in a properly supported claim", which may well have been intended to require, in addition to the existence of the disabilities enumerated by the statute, that showing should be made of their vocationally disabling character.

With the promulgation of Regulation 3140 in May 1930, the permissive language previously applicable to the adjudication of insurance claims was changed to a mandatory provision, but it may be questioned whether, even in the changed form, the regulation was not intended to be for administrative application to existing contracts only. Support for such a view may be found in the decision of this Court in *Meadows* v. *United States*, 281 U. S. 271. It was therein held that a statutory provision for the reinstatement of lapsed insurance contracts as contained in the Act of August 9, 1921, 42 Stat. 147, 156, 157, and carried into the Act of June 7, 1924, 43 Stat. 624, 625, was not an obligation of a contract which had previously expired.

A claim to the benefit of reinstatement provided for in the statute was regarded as one not under the contract of insurance and therefore not permissible of litigation under the terms of Section 19,

46 Stat. 993, World War Veterans' Act of 1924, as amended (38 U. S. C. 445). In the instant case the contract of insurance lapsed for premium nonpayment in May 1919, 11 years before promulgation of the regulation which petitioner now seeks to have read into the expired contract. As petitioner apparently views his case, retrospective application of the regulation is indispensable to breathe life into an otherwise defunct contract.

But we find no statutory authority, express or implied, warranting the revival by regulation of contracts of insurance otherwise lapsed. In instances where Congress has provided for revival of lapsed contracts specific authority therefor was given (Cf. Sections 304, 305, 308, and 309, World War Veterans' Act, as amended) and the principle of *inclusio unius est exclusio alterius* would seem applicable.

Even if there can be read into the provision of Section 401 of the original War Risk Insurance Act, or any of the amendments thereto, the intention to authorize enlargement by regulation of contract insurance rights, nothing in that section or the amendments seems other than prospective in character. This Court has frequently ruled that such effect is to be given in statutory construction unless the language is express to the contrary, or there is a necessary implication to that effect. See *Fullerton Co.* v. *Northern Pacific,* 266 U. S. 435, 437; *Harvey* v. *Tyler,* 2 Wall. 328, 347; *Shwab* v. *Doyle,* 258 U. S. 529, 534.

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We believe it manifest that neither by express nor implied Congressional intention can there be found warrant for a revival by regulation of lapsed insurance contracts in the manner sought herein. All statutory provisions relating to insurance appear of prospective application only except where Congress has expressly provided for revival of insurance as in the sections cited above. Moreover, to assume that lapsed contracts may be subsequently revived by regulatory provisions promulgated many years after the expiration of insurance would lead to results both inequitable and clearly beyond Congressional intendment.

If an insured early litigated a claim, which under the then existing contract could not be maintained, an adverse judgment would either deprive him of rights subsequently accorded by regulation to another insured, whose claim might originally be identical, or would possibly result in extending litigation rights beyond the period which Congress by the amendment of Section 19 indicated it desired limited. The latter eventuality would of course arise only if Section 19 were so construed as to hold that the promulgation of the regulation was an accrual of the right from which the six-year statute of limitations would run. We doubt that any such construction would be sustained, for in addition to other reasons which could be urged in opposition, it would sanction litigation indefinitely. But either eventuality would seem clearly opposed to Congressional intention.

If we are correct in the view thus suggested, that no authority exists to confer rights by regulation in lapsed contracts which would have the effect of breathing life into defunct policies, it would not appear essential to the determination of this case to consider provisions similar to Regulation 3140, which had been made part of Government insurance policies (converted insurance) at the time of the issuance or while the insurance was in force. Similarly there may be excluded from consideration the application of both Regulations 3140 and 3122 to war-risk insurance contracts which were not lapsed when the regulations were promulgated.

Only one other contention of petitioner merits discussion. Presumably with the purpose of urging that the Director was empowered to make the provisions of war-risk and Government (converted) insurance conform to standards generally prevailing in policies issued by private companies, he asks this Court to take judicial notice of his allegation that such policies "quite generally carry a provision" which he asserts is identical with Regulation 3140 (Br. p. 14).

While it is true that some companies do include in their policies a stipulation that "the entire and irrevocable loss of the sight of both eyes or the use of both hands, or both feet, or one hand and one foot, will be considered total disability" (See Amrhein's The Liberalization of the Life Insurance Contract, 1933, pp. 282–283; and Cf. The Handy Guide to Standard and Special Contracts,

1934, The Spectator Company) this provision is not universal and no policy that has come to our attention presumes that such disability would arise if the loss is of a hand and an eye.

For reasons previously discussed such contention has no support in the terms or purpose of the Congressional authorization, particularly as the Government disability insurance was gratuitous in nature while private companies may make premium charges conform to the degree of liberality of the disability provision inserted in the policy.

The fact that some insurance contracts issued by private companies contain such provisions as above set out does not authorize the Director to change the terms of the insurance contract authorized by the Act of Congress.

In view of the foregoing we respectfully submit that Congress has not expressly, or by implication, authorized the enlargement by regulation of the Government's liability for disability insurance to include claims where total permanent disability does not in fact exist. Especially is it contended that administrative authority was not conferred retroactively to create justiciable rights in defunct contracts of more liberal character than authorized by Congress.

There remains then only the question whether or not a judgment was properly entered against petitioner upon the evidence adduced by him in the trial court.

III

A VERDICT WAS PROPERLY DIRECTED FOR THE RESPONDENT

The petitioner lost his right arm while his insurance was in force (R. 12). His one medical witness, Dr. Pennington, who had examined him in September 1932, testified that petitioner had one-tenth vision in the left eye, defective from birth (R. 15).

The insurance lapsed May 31, 1919 (R. 11). During that year the petitioner wrote the Government that his physical condition was good except for the loss of the arm, meaning thereby, he explained at the trial, that his general health was good (R. 14). The only other evidence relating to the petitioner's health is that it "got bad" during a course of vocational training furnished by the Government and discontinued by the insured (R. 14).

It has been frequently ruled in war-risk litigation, and appears well settled, that the loss of a limb does not establish a claim of total permanent disability. *Bridges* v. *United States,* 67 F. (2d) 320 (C. C. A. 5th); *United States* v. *Thomas,* 53 F. (2d) 192 (C. C. A. 4th); *Thompson* v. *United States,* 65 F. (2d) 897 (C. C. A. 8th); *United States* v. *Ivey,* 64 F. (2d) 653 (C. C. A. 10th); *United States* v. *Harris,* 66 F. (2d) 71 (C. C. A. 4th); *United States* v. *Mayfield,* 64 F. (2d) 214 (C. C. A. 10th); *Parker* v. *United States,* 62 F. (2d) 1055

(C. C. A. 4th). In several of the cases cited above the addition to the loss of a limb other disabilities apparently more disabling than the defective vision of petitioner's left eye were held insufficient to warrant a finding of total permanent disability.

When the petitioner applied for life insurance (R. 14) he did not in response to a question relating thereto say anything about his left eye for the reason, he explained at the trial, that he did not think it would affect the risk (R. 14–15). Nor did he, in testifying concerning his post-war employment (R. 13–14), mention any difficulties of vision.

Before the war the petitioner was a surveyor or "practical engineer" with three years of high-school education (R. 13–14). He testified that after service his loss of an arm made it impracticable for him to retain employment with a packing concern in lifting heavy quarters of meat or as a telephone order clerk (R. 13) or with a wholesale house in handling bolts and heavy ironware or in the rug department (R. 13). Also he was unable with one hand to demonstrate sections of tires while employed as salesman for a rubber goods company (R. 14).

He worked for two other concerns as a salesman, but without success (R. 14). It does not appear that the loss of his arm handicapped him in either job, as he testified that the reason he failed was that he "did not have any talent for it" (R. 14).

A job as "hazard inspector", for which his disabilities are not shown to have handicapped him, did not last more than a month (R. 13).

The petitioner testified that since April 1919 he has received from the Government an average monthly compensation of $90.00 (R. 15); that he received $2,500.00 as his share when he and his brother subdivided an inherited farm and sold lots (R. 14); that he had diligently but unsuccessfully sought other employment, but since April 1919 had earned by his own efforts only $405.00 (R. 15).

The record of work unsuccessfully attempted fully justifies an inference, required also by the nature of his disability, that petitioner has been unable to handle heavy materials or work as a telephone order clerk. But there is no substantial evidence that he has sought employment and been unable to engage in the many occupations followed successfully by men who have lost an arm. It has been held that disability precluding merely the pursuit of a particular type of work does not constitute total permanent disability within the meaning of the War Risk Insurance Act and the contract of insurance (*Lumbra* v. *United States,* 290 U. S. 551; see also *United States* v. *Thomas,* 53 F. (2d) 192 (C. C. A. 4th); *Proechel* v. *United States,* 59 F. (2d) 648 (C. C. A. 8th), certiorari denied, 287 U. S. 658), and that "The policy is not against nonemployment" *United States* v. *McCreary,* 61

F. (2d) 804, 808 (C. C. A. 9th). Cf. *Hanagan* v. *United States,* 57 F. (2d) 860 (C. C. A. 7th); *United States* v. *Hairston,* 55 F. (2d) 825 (C. C. A. 8th).

The subdivision and sale of his father's farm indicates an occupation adapted to the petitioner's early experience and present disability. Further, the petitioner has not shown a lack of mental capacity or opportunity to acquire any training necessary to the pursuit of occupations especially adapted to his disabilities, and the record discloses that vocational training was furnished by the Government and discontinued by the petitioner because of bad health (R. 14), presumably temporary, since it is not mentioned in any other connection. Cf. *Proechel* v. *United States, supra.*

Dr. Pennington, petitioner's single medical witness, was an eye specialist whose factual testimony was limited to the condition of the petitioner's left eye, which he had examined in September 1932 (R. 15–16). He testified that petitioner was more handicapped by the loss of his right arm because of the defective vision of the left eye as, in guiding the left arm, he had to turn and look at an angle with his right eye, and he expressed the opinion that petitioner was totally disabled although "he could manage a farm" (R. 15). Such opinion testimony has been held incompetent and without weight. *United States* v. *Spaulding,* No. 161, October Term, 1934, decided January 7, 1935;

United States v. *Stephens* (C. C. A. 9th), 73 F. (2d) 695; *United States* v. *Steadman* (C. C. A. 10th); *Prevette* v. *United States,* 68 F. (2d) 112 (C. C. A. 4th), certiorari denied, 292 U. S. 622; *Hamilton* v. *United States,* 73 F. (2d) 357 (C. C. A. 5th); *United States* v. *Doublehead,* 70 F. (2d) 91 (C. C. A. 10th).

The claim here asserted was filed in the Veterans' Administration June 5, 1931 (R. 2). The nonassertion of claim for more than twelve years after the expiration of the contract appears particularly significant when it is considered that the disability was nonprogressive, the petitioner received compensation therefor (R. 15), was awarded vocational training (R. 14), and sought renewed insurance protection (R. 14–15).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
RANDOLPH C. SHAW,
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JANUARY 1935.

APPENDIX

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or permanent and total disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act, 40 Stat. 555, provided that the Director of the Bureau of War Risk Insurance—

> * * * shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *

Pursuant to this authority there was promulgated March 9, 1918, Treasury Decision, No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been

paid, as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue.

Section 19 of the World War Veterans' Act of 1924, as amended (46 Stat. 993), Section 445 of Title 38, U. S. C. A., insofar as herein relevant, provides as follows:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder, an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, That for the purposes of this section it shall be

deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities.

Subdivision 3 of Section 202 of Title II (Compensation and Treatment), World War Veterans' Act, 1924, as amended (43 Stat. 618) (38 U. S. C. 473, 478, 479), provides that:

If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: *Provided, however,* That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bed-ridden, shall be deemed to be total permanent disability: *Provided further,* That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: *Provided further,* That for double total permanent disability the rate of compensation shall be $200 per month.

That any ex-service man shown to have a tuberculous disease of compensable degree, and who has been hospitalized for a period of one year, and who, in the judgment of the director will not reach a condition of arrest

by further hospitalization, and whose discharge from hospitalization will not be prejudicial to the beneficiary or his family, and who is not, in the judgment of the director, feasible for training, shall, upon his request, be discharged from hospitalization and rated as temporarily totally disabled, said rating to continue for the period of three years: *Provided, however,* That nothing in this subdivision shall deny the beneficiary the right, upon presentation of satisfactory evidence, to be adjudged to be permanently and totally disabled: *Provided further,* That in addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental, medical, surgical, and hospital services, including payment of court costs and other expenses incident to proceedings heretofore or hereafter taken for commitment of mentally incompetent persons to hospitals for care and treatment of the insane, and shall be furnished with such supplies, including wheel chairs, artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary, which wheel chairs, artificial limbs, trusses, and similar appliances may be procured by the bureau in such manner, either by purchase or manufacture, as the director may determine to be advantageous and reasonably necessary: *Provided,* That nothing in this Act shall be construed to affect the necessary military control over any member of the Military or Naval Establishments before he shall have been discharged from the military or naval service: *Provided further,* That where any person entitled to the benefits of this paragraph has heretofore been hospitalized in a State institution, the United

States Veterans' Bureau is hereby authorized to reimburse such person, or his estate, where payment has been made to the State out of the funds of such person, or to reimburse the State or any subdivision thereof where no payment has been made for the reasonable cost of such services from the date of admission.

There shall be paid to any person who suffered the loss of the use of a creative organ or one or more feet or hands as the result of an injury received in the active service in line of duty between April 6, 1917, and November 11, 1918, compensation of $25 per month, independent of any other compensation which may be payable under this Act: *Provided, however,* That if such injury was incurred while the veteran was serving with the United States military forces in Russia, the dates herein stated shall extend from April 6, 1917, to April 1, 1920.

Subdivision 4 of Section 202 of Title II (Compensation and Treatment), World War Veterans' Act, 1924, as amended (43 Stat. 618; 38 U. S. C. 474), provides as follows:

If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum.

A schedule of ratings of reductions in earning capacity from injuries or combinations of injuries shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be

based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment which results from such injuries. The bureau shall from time to time readjust this schedule of ratings whenever actual experience shall show that it is unjust to the disabled veteran.

Veterans' Administration Regulation No. 1115 (effective March 2, 1931) provides, in part, as follows:

> A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa.

Veterans' Administration Regulations Nos. 3122, 3140, 3205 provide as follows:

> 3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bed-ridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability

shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

* * * * *

3140. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bed-ridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance or any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

* * * * *

3205. Since decisions of the insurance claims council determining the existence or nonexistence of total and permanent disability for insurance purposes and decisions of rating agencies determining the existence or the nonexistence of total and permanent disability for compensation or disability allowance purposes are based upon distinctly dissimilar standards, it follows that the former cannot be determinative for compensatiton or disability allowance purposes and the latter cannot be determinative for insurance purposes. (November 1, 1931.)

War Risk Regulation No. 57:

NOVEMBER 26, 1920.

By virtue of the authority conferred in section 13 of the war risk insurance act, the

following regulation, effective this date, is issued relative to the effective date of original awards, revised awards, and reawards of disability compensation other than total permanent disability awards, and to the procedure in making, and rules for determining, total permanent disability awards of compensation and insurance, and the effective dates thereof.

A. Effective Date of Compensation Disability Awards Other than Total Permanent Disability Awards.

* * * * *

B. Total Permanent Disability Awards for Compensation and Insurance Purposes.

* * * * *

III. The procedure in making total permanent disability ratings for purposes of insurance, or compensation, or both, shall be as follows:

(a) All cases which involve the making of a total permanent disability rating or the termination or reduction of a total permanent disability rating shall be acted upon by the medical board of review and also by the compensation and insurance claims division board of appeals, and subject to the provisions of Bulletin No. 63–C (Bureau of War Risk Insurance), or any amendments thereto.

* * * * *

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, " Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one

eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously any substantially gainful occupation and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

(c) When a presumption of total permanent disability is established under the following conditions:

1. Where the disabled person is on the date of the issuance of this regulation, or hereafter shall be, either an inmate of a hospital or asylum during a continuous period of six months or more; or on the date of the issuance of this regulation is, or hereafter shall be, rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more, and be unable to follow continuously any substantially gainful occupation during such six months; and in addition at the time of the medical examination hereinafter prescribed shall be found then to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation.

2. Before the disabled person shall be rated totally and permanently disabled under the preceding paragraph, a medical examination shall be conducted for the purpose of ascertaining his or her true physical and mental condition, and in addition all facts as to his or her ability to engage con-

tinuously in a substantially gainful occupation shall be procured.

3. While the disabled person is an inmate of a hospital or asylum, he or she shall be deemed during such period to be temporarily totally disabled and unable to follow continuously any substantially gainful occupation, unless and until his or her disability rating is made permanent and total under the conditions of this regulation.

V. All persons rated totally and permanently disabled shall be medically examined from time to time, but at least once every six months from the date of such rating for the purpose of determining whether or not the rating of total permanent disability should be continued or be modified, unless it is clearly shown that such examinations are wholly unnecessary.

VI. The effective dates of total permanent disability ratings and awards thereon made in accordance with the provisions of Paragraph IV shall be as follows: For the purpose of increasing compensation, total permanent disability awards may be made retroactive to the date from which the disabled person shall have been unable to follow continuously any substantially gainful occupation, and was an inmate of a hospital or asylum, or rated as totally disabled or temporarily and totally disabled, but not more than one year anterior to the date of claim therefor, or, in case of an original award of compensation, the total permanent disability award may be made retroactive to the date from which the disabled person was unable to follow continuously any substantially gainful occupation, and was an inmate of a hospital or asylum, or rated as totally disabled, or temporarily and totally

disabled, but not more than two years anterior to the date of claim therefor.

VII. Upon a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with provisions of Paragraph IV above. Such awards may be made retroactive to the date of the commencement of such total permanent disability if the case falls within the provisions of subparagraphs (a) or (b) of Paragraph IV above, or to the date of the commencement of the period during which the person is presumed to be permanently and totally disabled if the case falls within subparagraph (c) of Paragraph IV above.

Awards of total permanent disability under the contract of converted insurance shall be governed by the terms and conditions of the converted policy.

* * * * *

Veterans' Bureau Regulation No. 4:

SEPTEMBER 12, 1921.

A. Effective Date of Compensation Disability Awards Other Than Total Permanent Disability Awards.

* * * * *

B. Total Permanent Disability Awards for Compensation and Insurance Purposes.

III. The procedure in making total permanent disability ratings for purposes of insurance, or compensation, or both, shall be as follows:

(a) All cases which involve the making of a total permanent disability rating or the termination or reduction of a total permanent disability rating shall be acted upon by the medical board of review and also by the

claims division board of appeals, subject to the provisions of bulletin No. 63–C (Bureau of War Risk Insurance), or any amendments thereto.

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, "Loss of both feet or both hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously a substantially gainful occupation, and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

V. All persons rated totally and permanently disabled shall be medically examined from time to time, but at least once every six months from the date of such rating for the purpose of determining whether or not the rating of total permanent disability should be continued or be modified, unless it is clearly shown that such examinations are wholly unnecessary.

VI. The effective dates of total permanent disability ratings and awards thereon made in accordance with the provisions of Paragraph IV shall be made as follows:

(a) For the purpose of an original award of compensation, total permanent disability

awards may be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of Paragraph IV hereof, but in no case more than two years anterior to the date of claim therefor.

(b) For the purpose of increasing compensation, total permanent disability awards based—

Upon Paragraphs IV (a) or IV (b) will be made in accordance with the provisions of Paragraphs I (b) and I (c) respectively, of this regulation.

VII. On a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with the provisions of Paragraph IV above. Such awards shall be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of said paragraph.

VIII. Subject to the limitations contained in paragraph 9 of the converted insurance policy, the effective date of awards of total permanent disability under the contract of converted insurance shall be determined in the same manner as awards of total permanent disability for yearly renewable term insurance purposes.

* * * * *

Section 27 of the World War Veterans' Act of 1924 (43 Stat. 615), provides as follows:

> That all payments of compensation and insurance heretofore made pursuant to a regulation permitting permanent and total disability to be presumed from hospitalization or ratings of less than permanent total

disability shall be deemed valid and no recovery thereof shall be made: *Provided,* That nothing herein shall operate to validate insurance not in force on the date an award thereof was approved, except where premiums have been thereafter accepted.

Section 401 [1] of the War Risk Insurance Act of 1917 (41 Stat. 374), provides as follows:

> That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service: [2] *Provided,* That any person

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[1] Section 401, as amended June 25, 1918, is in effect as of Oct. 6, 1917:

"*Provided,* That nothing herein shall be construed to interfere with the payment of monthly installments, authorized to be made under the provisions of said section 401 as originally enacted, for the months up to and including June 1918: *Provided further,* That all awards of automatic insurance under the provisions of said section 401 as originally enacted shall be revised as of the 1st day of July 1918 in accordance with the provisions of said section 401 as amended." (Extract from section 20 of Act of June 25, 1918.)

[2] The time within which application must be made was extended by the following Joint Resolutions:

(Pub. Res.—No. 22—65th Cong.)

(S. J. Res. 128)

Joint Resolution Granting to certain persons in the active war service an extension of time within which application for insurance may be made under section four hundred and one of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department", approved Sep-

in the active service on or after the 6th day of April 1917, and before the 11th day of November 1918, who, while in such active service, made application for insurance after the expiration of more than one hundred and twenty days after October 15, 1917, or more than one hundred and twenty days after entrance into or employment in the active service, and whose application was accepted and a policy issued thereon, and from whom premiums were collected, and who becomes or had become totally and permanently disabled, or dies or has died, shall be deemed to have made legal application for such insurance and the policy issued on such application shall be valid. Any person in the active service on or after the 6th day of April 1917, and before the 11th day of November 1918, who, while in such service, and before the expiration of one hun-

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tember second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time within which application for insurance may be made as set forth in section four hundred and one of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department", approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, is hereby extended, with respect to every person in the active war service as to whom the time for making application would expire before the twelfth day of April, nineteen hundred and eighteen, so that every such person may make application for insurance up to and including the said twelfth day of April, nineteen hundred and eighteen: *Provided*, That nothing herein shall be construed to effect an extension of the automatic insurance provided for in the said section four hundred and one beyond the twelfth day of February, nineteen hundred and eighteen.

Approved, February 12, 1918.

dred and twenty days after October 15, 1917, or one hundred and twenty days after entrance or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; and any person inducted into the service by a local draft board after the 6th day of April 1917, and before the 11th day of November 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totaliy and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: *Provided, however,* That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be

provided by regulations: *Provided further,* That each officer and enlisted man attached to the United States ship *Cyclops* on the 4th day of March 1918, and every officer and enlisted man who on said date was a passenger on said vessel shall be deemed to have been granted insurance in the sum of $5,000 permitted under the War Risk Insurance Act.

(Pub. Res.—No. 27—65th Cong.)

(S. J. Res. 133)

Joint Resolution Authorizing the granting of insurance under the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, on application by a person other than the person to be insured

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That insurance under the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department", approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, shall be granted by the Bureau of War Risk Insurance on application made by the person to be insured or, subject to such regulations as the bureau may prescribe, by any person within the permitted class as specified in section four hundred and two of said Act: *Provided,* That the person to be insured has been taken a prisoner of war before April twelfth, nineteen hundred and eighteen: *And provided further,* That no one but the insured may designate a beneficiary, and nothing in this resolution shall be deemed to change or affect the permitted class of beneficiaries or impose any obligation on the insured against his will.

Approved, April 2, 1918.

U. S. GOVERNMENT PRINTING OFFICE 1939

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1. Director authorized by statutes to prescribe terms of contract, by regulation or otherwise.
2. Terms of contracts were determined from time to time by Director as authorized by Statutes.
3. That certain specific physical conditions should constitute "total permanent disability" as used in insurance contract was determinable by Director, and such determination is binding on parties to contract.
4. Validity and propriety of Director's action recognized by subsequent legislation reenacting without changes in this respect those portions of statutes under which determinations were made.
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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 342

MADISON L. MILLER, JR.,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF VETERANS' ADMINISTRATION ON SECOND POINT IN THE BRIEF FOR THE UNITED STATES FILED BY THE SOLICITOR GENERAL

The Solicitor General on page 2 of his brief states the question to be:

"2. Does the law authorize the issuance of a regulation making the provisions of the statute relating to compensation applicable to insurance and retroactively effective?"

STATUTES AND REGULATIONS INVOLVED

Public 193, 63d Congress, approved September 2, 1914, entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department", 38 Stat. 711, and sundry Acts amendatory thereof, all of which are enumerated and the applicable excerpts therefrom copied in this brief or the appendix hereto. (See Index.)

REGULATIONS

Bureau of War Risk Insurance Bulletin No. 1, issued October 15, 1917.

Treasury Decision No. 20, issued March 19, 1918.

Treasury Decision No. 42, issued March 18, 1919.

Treasury Decision No. 42, as amended in April 1920.

Bureau of War Risk Insurance Regulation No. 54, issued July 21, 1920.

Bureau of War Risk Insurance Regulation No. 57, issued November 26, 1920.

United States Veterans' Bureau Regulation No. 4, paragraphs IV and VII, issued September 12, 1921.

Section 1115, compiled Regulations, Veterans' Bureau (Compensation Part).

Sections 3139–40, compiled Regulations, Veterans' Bureau (Insurance Part).

Such regulations or those portions thereof applicable to the present question are copied in this brief or in the appendix hereto, except insofar as the

same are printed in the appendix to the brief filed by the Attorney General.

STATEMENT

The Solicitor General has invited the Veterans' Administration to submit to the Court such historical data and discussion as it is thought may be helpful to the Court in determining the correct construction of the insurance contract provisions, of the statutes involved, and the validity of certain regulations issued during the period of approximately twenty years last past, and pertaining to such contracts, to the construction of said statutes, and the application thereof by the various administrative officers charged with such duty, to wit: the Secretary of the Treasury, the Director of the Bureau of War Risk Insurance, the Director of the United States Veterans' Bureau, and the present official, the Administrator of Veterans' Affairs, successively.

The scope of this brief is limited to this question, viz: the validity of the "specific loss" provisions of the insurance contracts and of the relevant regulations promulgated under the several statutes applicable.

It is believed that the question numbered "2" in the Solicitor General's brief and which is copied on the first page hereof is not at all the real law question now presented to this Court and it may be helpful to restate the question at issue, with which

this brief undertakes to deal. It is accordingly restated as follows:

Was the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury (and the several administrative officers succeeding to the duties and powers conferred by Public, No. 193 of the 63d Congress, approved September 2, 1914, and the various amendments thereto), empowered to prescribe the term and conditions of the several types of insurance contracts authorized by the statutes in question? Specifically, was the Secretary of the Treasury (and his successors under the various Acts in question) authorized to provide in the insurance contracts issued to members of the military and naval forces during the World War that such contracts should mature by reason of the "total and permanent disability" of the insured (that being one of the contingencies insured against) upon the insured becoming afflicted with certain specified conditions of the body, e. g., loss of two hands, or one arm and one eye, two feet, etc.?

In the instant suit the question arises under a contract of term insurance issued during the period of hostilities while the Petitioner was a member of the military forces of the United States. But the question is vitally important and the decision thereof will be of wide application because of the fact that there are now outstanding and in force approximately 600,000 contracts of

so-called converted insurance issued under the same statutory authority and containing similar provisions with respect to the maturity thereof upon the insured suffering sundry specific losses therein described. These provisions were incorporated in such contracts by virtue of the regulatory and other authority believed to have been conferred upon the Bureau of War Risk Insurance under the direction of the Secretary of the Treasury and upon the designated officials succeeding to the duties and authority of such Secretary.

SUMMARY OF ARGUMENT

1. The Director of the Bureau of War Risk Insurance (and his successors) possessed authority to determine the "terms and conditions" of the proposed insurance contracts, expressly conferred by statute.

2. Such officials similarly possessed authority to determine and prescribe the character and quantum of proof required to establish maturity of the insurance contract, and to make reasonable rules in respect thereto.

3. As a part of such powers, and incident thereto, the Director had the power to, and properly did, provide in the contracts, in regulations, and by instructions to personnel engaged in adjudicating claims asserted by reason of alleged total and permanent disability, certain criteria to govern the determination of such questions—e. g., loss of use of legs, arms, etc.

4. That some or all of such standards of measurement or rules with respect to insurance were similar to or identical with standards of measurement or rules prescribed by the Director or by Congress for application to *compensation* claims is unimportant.

5. The validity and the propriety of the contract provisions in question and of the regulations pertaining to the subject are established by reason of the re-enactment from time to time of the relevant sections of the statutes without change in the language thereof.

6. The uniform construction of the statutes over a period of many years by the administrative officials charged with that duty will not be disturbed by the Court, especially since—

(a) Congress has legislated in the light of such construction without changing the law with respect to the point at issue, and

(b) Congress provided by the Act of July 3, 1930, that the Director's "decisions of questions of fact and law * * * shall be conclusive" (with certain exceptions not here material).

A reconsideration of the entire question has necessarily led to the conclusion that said several administrative officials did possess the power which they exercised and that they were authorized to exercise it in the manner they did.

ARGUMENT

The original statute enacted September 2, 1914, created in the Treasury Department the Bureau of War Risk Insurance and provided that said Bureau "shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes" against the risks of war (Section 2, 38 Stat. 711).

Section 4 of said Act provided that said Bureau, with the approval of the Secretary of the Treasury, "shall have power to make any and all rules and regulations necessary for CARRYING OUT THE PURPOSES of this Act." 38 Stat. 711.

The original Act was amended June 12, 1917, by Public, No. 20 of the 65th Congress. This amendment enlarged the scope of the insurance to include Masters, officers, or crews of American vessels, as well as vessels, their freights and cargoes. This insurance was to cover against loss of life or personal injury and for compensation during detention following capture by the enemy. 40 Stat. 102.

Section 4 thereof amended Section 3 of the prior Act and authorized the Bureau "to adopt and publish FORMS OF WAR RISK policies and to fix rates of premiums." 40 Stat. 103.

Section 5 added a new section to the prior Act, 3a, which provided that "Such insurance shall provide, * * * In case of death, or permanent disability which prevents the person injured from

performing any and every kind of duty pertaining to his occupation, or THE LOSS OF BOTH HANDS, BOTH ARMS, BOTH FEET, BOTH LEGS, or BOTH EYES, OR ANY TWO THEREOF" for the payment of certain sums of money therein stated. 40 Stat. 103.

Paragraph (b) provided that for the loss of one arm 65% of the principal sum should be paid, and for the loss of one eye, 45% of the principal sum; total destruction of hearing 50%, etc. 40 Stat. 103. The Bureau was further authorized to "include in its policy undertakings to pay specified percentages of the principal sum for other losses or disabilities."

It will be noted that the percentage evaluation specified in the statute for the loss of one arm, and one eye, aggregates 110%.

On October 6, 1917, there was approved an amendment to said Act of September 2, 1914, which not only extended the insurance to members of the military and naval forces, but provided for compensation and allotments and family allowances for the members of such forces. (Public 90, 65th Congress.) 40 Stat. 398. Section 13 of this Act of October 6, 1917, provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act,

necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to * * * compensation, OR INSURANCE provided for in this Act, * * * and the manner and form of adjudications and awards." 40 Stat. 399.

Pursuant to such authority the administrative officers did determine that proof of existence of any of the enumerated specific losses should be the quantum of proof necessary to establish maturity of the contract.

Section 20 appropriated certain sums and provided that "Payments from this appropriation shall be made upon and in accordance with awards by the director." 40 Stat. 400.

Section 400 (being the first section in Article IV of the Act of October 6, 1917) was the basic authorization for insurance to be issued members of the military and naval forces to cover "the death OR TOTAL PERMANENT DISABILITY of any such person." 40 Stat. 409.

Section 402 of said Act required the director to "promptly determine upon and publish the full and exact terms and conditions of such contract of insurance", and provided for payment in case of death to certain designated relatives "and also

during permanent and total disability to the injured person." 40 Stat. 409. Section 402 further provided that "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for ALTERNATIVE BENEFITS TO THE INSURED and the beneficiaries as may be found to be reasonable and practicable, MAY BE PROVIDED FOR in the contract of insurance, or from time to time by regulations." 40 Stat. 409.

Bulletin No. 1 of the Bureau of War Risk Insurance was promulgated by the Director thereof October 15, 1917, pursuant to the afore-mentioned statutory requirements. There was incorporated therein a form of the policy as required which appears in the appendix of this brief. It will be noted that this form provided that the insurance was granted subject to the above-mentioned statutes and "*of any amendments thereto and all regulations thereunder now in force or hereafter adopted.*" It did not within its provisions define "total permanent disability", but simply stated that if the insured should become "totally and permanently disabled, *commencing with such disability as established by the award of the director* * * *."

It also contained a provision that the insurance might be converted into any form "selected from

among those that may be prescribed by regulations of the bureau."

On March 9, 1918, the Secretary of the Treasury approved and there was promulgated what is known as "Treasury Decision No. 20", Bureau of War Risk Insurance. This was issued under authority of Section 13 of the Act of October 6, 1917, and defines "total permanent disability." It is general in its terms and *does not purport to be exclusive.* It does not in terms refer to any of the so-called "specific losses" (amputation, etc.). The general definition of total permanent disability is by the terms of said Treasury Decision No. 20, applicable to compensation and insurance alike, the former being provided for in Article III and the latter in Article IV of the Act of October 6, 1917. A complete copy of Treasury Decision No. 20 appears in the appendix hereto.

During the latter part of 1917, and most of the year 1918, the war was in progress and necessarily there was little time available for formulating definite policies with respect to military and naval insurance by the Bureau, especially in view of the fact that it was largely concerned with family allotments, allowances, disability compensation, and a tremendous task of forming an organization.

It will be recalled that Article III deals with compensation and Article IV with insurance, and that in Article III, in addition to the general provisions with respect to total disabilities, certain so-called "specific losses" are enumerated and com-

pensation at the rate of $100.00 per month provided therefor, although under the general provisions of the Act of October 6, 1917, "total disability" entitled the applicant to $30.00 per month. Section 302. 40 Stat. 406.

The earliest form of converted insurance policy authorized and promulgated by the Bureau of War Risk Insurance (February 19, 1919) contains in paragraph 9 thereof a definition of "total permanent disability", upon the occurrence of which the contract matured. It is as follows:

> * * * Total permanent disability as referred to herein is an impairment of mind or body due to injury or disease, which will prevent the Insured from following continuously and permanently any substantially gainful occupation. Without prejudice to any other cause of disability, it is further agreed that the entire and irrecoverable loss of the sight of both eyes, or the severence of both hands at or above the wrists, or of both feet at or above the ankles shall be considered as total permanent disability within the meaning of this contract. * * *

In March 1919 the Form of Policy just mentioned was revised somewhat. Paragraph 9 of this revised form defines "total permanent disability" as follows:

> Total permanent disability as referred to herein is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substan-

> tially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Without prejudice to any other cause of disability, it is further agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet shall be considered as total permanent disability within the meaning of this contract. * * *

It is evident that this is the Form No. 741, one of those mentioned in Treasury Decision No. 42, dated March 18, 1919, entitled: "Regulation Prescribing the Forms of Application and Policies to be used in the conversion of War Risk Insurance." Said Treasury Decision No. 42 recites that such form (and others therein mentioned) are "on file in the Office of the General Counsel of the Bureau of War Risk Insurance" and authorizes the making of contracts "under terms and conditions set forth therein."

In the meantime, the statute was further amended by Public, No. 151 of the 65th Congress, 40 Stat. 555, approved May 20, 1918; but the above quoted and referred to portions of Section 13 of the Act of October 6, 1917, were reenacted without substantial change so far as the present question is concerned. Public, No. 175 of the 65th Congress, approved June 25, 1918, made sundry changes in various sections of the law but Section 402 was

reenacted without substantial change so far as the present question is concerned.

On December 24, 1919, there was approved Public, No. 104 of the 66th Congress, 41 Stat. 371, which amended the statute in several respects. But the only change which is possibly relevant to the present question was contained in Section 11 thereof, amending Section 302 of the War Risk Insurance Act by providing (41 Stat. 373):

> That the loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total and permanent disability * * *.

In April 1920 the aforementioned Treasury Decision No. 42 was amended and new forms were substituted for those bearing the same numbers mentioned in Treasury Decision No. 42 of March 18, 1919,

> which said new forms, and not those referred to in said Treasury Decision No. 42, shall be used in the conversion

of the term insurance. The Form 741 filed with and referred to in said revised Treasury Decision 42 contained the following language in paragraph 9 thereof:

> Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substan-

> tially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * *. Without prejudice to any other cause of disability, it is agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, or the loss of one hand and one foot, shall be considered as total permanent disability within the meaning of this contract; * * *.

On July 21, 1920, Regulation No. 54 was promulgated by the Bureau of War Risk Insurance, the first paragraph thereof providing that "awards of insurance and compensation shall be based upon the same standards." The remainder of the order relates to procedural matters within the Bureau.

A memorandum signed by the then Director of the Bureau of War Risk Insurance and found in the file pertaining to said Regulation No. 54, dated July 20, 1920, requests approval of such regulation "at the earliest possible moment", and then states: "It will greatly expedite the handling of both insurance and compensation claims involving total permanent disability."

Regulation No. 57, promulgated by the Bureau of War Risk Insurance November 26, 1920, so far as material here, is copied on page 38 et seq. of the Solicitor General's brief. Attention is particularly invited to paragraph VII of said regulation, which provides that *awards of insurance may be "made*

in accordance with the provisions of paragraph IV" of such regulation. Said paragraph IV is in subdivision B of the regulation. It reads:

> IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:
>
> (a) When a statutory total permanent disability entitles a person to such rating, viz, loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden.
>
> (b) ----------
>
> (c) ----------

Said regulation was approved by D. F. Houston, Secretary of the Treasury, on November 26, 1920.

A noteworthy circumstance in connection with this question is that for nearly twenty years, with many officials considering the question from various angles, no one has entertained any doubt that as a matter of actual fact any person who suffered any of the *specific* losses mentioned in Regulation 57, or who had become "helpless and permanently bedridden", was, and necessarily must be, "totally and permanently disabled" for all purposes. It will be noted also that the conditions described in subparagraph (a) of paragraph IV of said Regulation No. 57 are the identical conditions "deemed to be total and permanent disability" by the terms of

paragraph 3, Section 302, of the War Risk Insurance Act as amended by Section 11 of Public, 104, 66th Congress, approved December 24, 1919.

This *fact,* however, does not support a *conclusion* that these specific losses were recognized to constitute "total permanent" disability for the reason that they were also recognized as applicable to compensation and were embodied in that portion of the statute relating to compensation. It is quite as reasonable to conclude they were so recognized for insurance purposes because they obviously did, as a matter of general knowledge and experience, produce such disability in one so afflicted. Common sense and the statute probably operated concurrently.

But, in any event, if the Director adopted for the purpose of insurance contracts the same standard of measurement for specific disabilities which Congress adopted for compensation purposes, it cannot be said the Director's determination was unreasonable. If reasonable, it was certainly within his power.

Evidently the then Director of the Bureau of War Risk Insurance followed the well-settled construction of the expression "total permanent disability" as reflected in numerous decisions by the State and Federal courts prior to the enactment of the statute under consideration.

Public, No. 47, of the 67th Congress, approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau, and by Section 3 thereof

> The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau * * * (42 Stat. 148).

Section 404 of Public No. 47 relates to the conversion of the term insurance theretofore written "*into such form or forms of insurance as may be prescribed by regulations and as the insured may request.*" Throughout said Act large discretionary powers are vested in the Director of the Veterans' Bureau and extensive authority is granted to him with respect to the promulgation of regulations pertaining to the subject matter within his jurisdiction. Section 30 of said Act added to Section 411 of the War Risk Insurance Act as follows:

> * * * policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums (42 Stat. 157).

Pursuant to the authority contained in the Act of August 19, 1921, the Director of the Veterans' Bureau, on September 12, 1921, promulgated "Veterans' Bureau Regulation No. 4." Its terms, so far as this question is concerned, are the same as subparagraph (a) of paragraph IV of said Regulation No. 57. The first sentence of paragraph VII of Regulation No. 4 is identical with the corresponding sentence in Regulation No. 57.

The next legislation touching this question was the World War Veterans' Act, approved June 7, 1924. Public 242, 68th Congress, 43 Stat. 607, 38 U. S. Code 193 et seq.

Section 202 thereof enumerates various benefits available, including compensation. Subparagraph 3 thereof provides "If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: *Provided, however,* That the permanent loss of the use of both feet or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears or becoming permanently helpless or permanently bedridden, shall be deemed to be total, permanent disability: * * *." And further provides for higher rates of compensation for total blindness, and for total blindness plus the loss of one or more limbs.

Subparagraph 4 provides that "A schedule of ratings of reductions in earning capacity * * * shall be adopted and applied by the Bureau."

Section 300 of that Act relates to insurance and is in substantially the same language as the prior Acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout, viz: "total permanent disability."

This Act also amended Section 202, and added a specific loss to those enumerated in Section 202 as it appeared in the Act of June 7, 1924, quoted above, to wit: "the organic loss of speech."

Sections 202 and 301 were again amended by Public No. 585 of the 70th Congress, approved May 29, 1928 (45 Stat. 964), but the same description of the loss insured against to wit, "total permanent disability" was used and the language of Section 301, with respect to the forms of insurance, being those prescribed by regulation, remained unchanged.

Public 522 of the 71st Congress, approved July 3, 1930 (46 Stat. 991), again amended the World War Veterans' Act in sundry respects. The first Section of that Act amends Section 5 of the Act of June 7, 1924, and as amended it reads:

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and

> SHALL DECIDE ALL QUESTIONS arising under this Act; and all DECISIONS OF QUESTIONS OF FACT AND LAW affecting any claimant to the benefits of Titles II, III, or IV SHALL BE CONCLUSIVE except as otherwise provided herein. * * *"

Title II relates to compensation and Title III relates to insurance. The exceptions indicated are those pertaining to suits on insurance contracts.

Section 202 was reenacted as part of Public 522, with certain changes not here material. As reenacted it contained the same provisions with respect to specific losses as are quoted above, including the "organic loss of speech."

The specific losses (amputations, blindness, etc.) enumerated in the World War Veterans' Act of June 7, 1924, and the amendments thereto, as indicated above, are identical with the specific losses enumerated in Section 3122 of the Veterans' Bureau Regulations, pertaining to converted insurance, and 3140 thereof, pertaining to term insurance. These Regulations were promulgated in March 1930.

It is apparent that the genesis of all these specific loss provisions was the Act of June 12, 1917 (40 Stat. page 102) amending the War Risk Insurance Act of September 2, 1914, and providing for payment of the principal sum or certain portions thereof to seamen on merchant vessels who suffered similar specific losses; plus the exercise by the

Director of the authority vested in him to determine the terms of the contract.

The caution at the end of Section 1115 of the Regulations, to wit, "A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa", obviously was directed to what might be termed the general disability cases as distinguished from the specific loss cases. It is incorporated in the section of regulations governing the adjudication of compensation claims, for the guidance of the rating boards functioning in that connection. The first paragraph of Section 1115 of the Regulations enumerates the same specific or so-called statutory losses as are embodied in the statutes just mentioned. As indicated, these identical losses are incorporated in the insurance contracts and in Sections 3122 and 3140 of the Regulations, being that part pertaining to insurance. It is respectfully reiterated that this does not necessarily mean they were incorporated in the insurance contracts *because* they appeared in the statute. The same enumeration of specific losses is contained in the later editions of the printed policies of "Government Life Insurance" or so-called converted insurance.

Nowhere in any of the numerous changes in Regulations, the numerous amendments and reenactments of various statutes on the subject, or in the several revisions of the insurance contracts themselves, or in the legislative or administrative history in connection with any of these changes,

does there appear to have been at any time during the period of approximately twenty years since the first enactment on the subject, any doubt in the mind of any official concerned with the subject as to the legality and propriety of the provisions now under discussion, to wit, the specific loss provisions in the insurance contract. These provisions are very similar to provisions contained in various disability insurance contracts issued by private corporations. Until the more recent changes embodying loss of hearing and of speech, they were substantially the same as the more or less standard disability insurance contracts. The other provision contained in the specific loss section of the Government insurance contract, to wit, "becoming permanently helpless or permanently bedridden", hardly calls for comment except to say that one could not imagine any case where an insured so afflicted would not be entitled to recover on an insurance contract insuring against total permanent disability, quite aside from the incorporation of any such language in the contract. There may be some "sales value" in specifically reciting such provision, somewhat as is true in commercial accident policies which specifically recite that they cover death or injury from lightning or sunstroke, or blood poisoning resulting from an accident. In most jurisdictions such language adds nothing at all to the scope of the contract.

In order to carry out the mandate of Congress with respect to carrying on Government insurance after the war, the administrative officials charged with the duty recognized that in order to maintain a reasonable and proper "spread of the risk" the contracts must in general conform to those offered by private corporations. If this were not so, then the Government would not retain any substantial number of *first class* risks. It was apparent that Congress intended these insurance activities to be carried on in a conservative, reasonable, business-like manner.

It is believed that so far as the scope of the risks covered is concerned, there is no difference between the present situation and that intended to be created by the early enactments of Congress pertaining to insurance (term insurance). In short, "the insurance" about which Congress legislated more or less continuously from 1914 to 1930 was a contract relating to that type of relationship generally understood as created and existing between the insurer and the insured with respect to the "coverage", or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term, but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally

incapacitate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." The expression has been so often discussed and defined that we will not burden the Court further in respect thereto. If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a practical and not a theoretical or abstract problem. It seems entirely clear that Congress intended for a contract to be made for practical purposes. It follows that the terms therein, the construction thereof, and the adjudication of claims arising thereunder should be reasonable, businesslike, and practical.

It is submitted that under the broad authority and power granted to the Secretary of the Treasury in the earliest enactments, and to his successors by the later enactments, it is entirely clear that such officials could properly make the contracts they did make, and which included the so-called "specific loss provisions"; and further, that without any such provisions in the contracts, such officials could properly have adjudicated claims upon the standards indicated. Some standard for the guidance of the subordinates actually doing the

rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court.

In the case of *Hahn* v. *United States*, 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper constructions of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> had not interfered with such constructions by the Secretary of the Treasury while the Act was in force.

This was in accord with the case of *United States* v. *Pugh,* 99 U. S. 265, wherein this Court in the course of its opinion observed—

> In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect.

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive

> in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be ACTED UPON FOR A NUMBER OF YEARS, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS

CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States*, 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time. A "draw back" under the customs act was there involved. In the course of the opinion, after restating the rule above indicated, this Court said:

> To this we must add that the department's interpretation of the statute has had such implied approval by Congress, that it should not be disturbed * * *. The draw back provision under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870 and the Court of Claims finds that the rule for determining the draw back on oil cake was applied during the whole of that period of almost ten years * * *. The reenacting of the draw-back provision four times without substantial change, while this method (i. e. departmental formula) of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. * * * (Citing cases) * * * for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government.

Attention is invited to the fact that the Secretary of the Treasury and his successors uniformly construed the insuring provisions in question from the beginning of operations under the Act of October 6, 1917, amending the original War Risk Insurance Act of September 2, 1914, as will be noted from the detailed history of the legislation hereinabove pointed out. Congress legislated on this subject almost continually. Various Sections of the Statute affecting the subject matter presently in issue were from time to time amended and rewritten. But nowhere has Congress during the intervening period of nearly twenty years indicated, directly or by implication, that the construction by the Secretary of the Treasury, and by the administrative officers successively performing the functions originally vested in the Secretary under the War Risk Insurance Act, was erroneous or contrary to the congressional intent. On the contrary, the terms of the contracts of insurance, as determined upon and adopted by the Bureau of War Risk Insurance and its successors, have received the sanction of legislative approval by Congress by virtue of the successive reenactments of the various sections of the statute after the construction thereof now questioned had been adopted by the administrative officials.

Express approval by Congress, and express confirmation of power vested in the Director (now Administrator) is manifested by the July 3, 1930, amendment to Section 5 of the World War Veter-

ans' Act. (Section 1, Public 522, 71st Congress, 46 Stat. 991.)

The first sentence of that section as amended July 3, 1930, reads:

> SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact AND LAW affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. * * *

The language is identical with the original Act of June 7, 1924, except that the words "and law", appearing in capitals in the above quotation were added by the Act of July 3, 1930. It is believed the power and the right asserted clearly existed theretofore, but if there existed any doubt on that point, certainly all such doubt was removed upon the approval of said Act of July 3, 1930.

Clearly, somebody was charged with the duty of determining the exact terms of the contract by Congress authorized and which was to be sold to several million men, comprising the military and naval forces of the United States. The power and authority to determine these terms of the proposed

contract was vested in the Secretary of the Treasury (Bureau of War Risk Insurance). Necessarily, the exercise of such power involved some considerable discretion. The purpose, as declared by Congress, was to insure against two certain contingencies, one described in very general terms. The happening of those contingencies necessarily had to be determined; and in cases of disability, the extent thereof ascertained. In the nature of things determination in the individual cases must be done by numerous subordinate officials and employees. It should not be left to the mere whim or the individual opinion of such adjudicating personnel. Certain more or less definite rules of measurement were indispensable. These rules, the Secretary of the Treasury and his successors determined upon and promulgated as contemplated and provided by Congress, and such rules became, were, and are those reasonable "rules and regulations not inconsistent with the provisions of this Act necessary or APPROPRIATE to carry out its PURPOSES", authorized by Section 13 of the Act of October 6, 1917. (40 Stat. Part 1, 398.)

They and their amendments, whether incorporated in regulations, denominated as such, or in the "policy" or contract, constituted the reasonable "rules and regulations" authorized in the successive acts from 1917 to the present which dealt with the subject matter of the present litigation. The reasonableness of the specific loss provision promulgated by the Secretary and his successors

is illustrated by the fact that Congress provided, in dealing with such specific losses in the case of seamen (in the Act of June 12, 1917, 40 Stat., Part 1, page 102), that 65% of the principal sum of the insurance contract should be payable for the loss of one arm and 45% thereof for the loss of one eye. During the many years this insurance has been in effect, and in spite of the numerous cases disposed of administratively and as the result of litigation, the validity of the so-called "specific loss provisions" of the insurance contract has not heretofore been questioned. In the opinion of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Cole*, 45 F. (2) 340, they were *assumed* to constitute part of the contract.

The rule indicated by this Court in numerous decisions, a few of which have been cited, has been recognized as applicable to the administrative practice of the Veterans' Bureau (Successor to the Bureau of War Risk Insurance). Attention is invited to page 146, volume 35, Opinions of the Attorneys General of the United States, where, in an opinion by the Attorney General, it is stated:

> "* * * I am informed that the Veterans' Bureau has construed compensation remaining uncollected to which a veteran is entitled at the time of death or permanent total disability as including compensation which is uncollectible at that time because of section 210, and has acted upon this construction in a large number of cases.

> If the construction placed upon a statute by the Department charged with its administration is not clearly erroneous, and has been followed in many cases, it should be respected and not overruled except for cogent reasons. * * *"

On February 28, 1933, the Attorney General addressed an opinion to the Administrator of Veterans' Affairs, relative to the naval pension payable under Sections 4756–7 of the Revised Statutes. In the course of this opinion the Attorney General stated:

> I have examined the question on the merits and it is obviously a debatable one. I admit the force of the arguments which have been advanced in support of the contention that payments under these two laws may be made concurrently, and if the question were a new one in respect to which there had been no prior rulings or administrative practice, it is possible that I would adopt the views expressed by members of your legal staff. The question, however, is not a new one. It has been the uniform administrative practice for a number of years to decline to make concurrent payments under both statutes, and it is nearly five years since the Comptroller General rendered a formal decision holding that such payments could not be made concurrently. In my service here in the Department of Justice I have adhered very strictly to the rule that wherever there is room for reasonable differences of opinion as to

> the meaning of a statute, long and consistent administrative interpretation of it by the officers charged with the duty of administering it should be followed. I have repeatedly urged that contention before the courts in Government litigation. It is undesirable from many points of view to overturn long-continued administrative practices based on an administrative construction of a statute. It appears in the present instance that the practical construction heretofore followed has been adhered to for a number of years and that *the Congress has not been dissatisfied with it or seen fit to modify it by legislative enactment.* * * *

The rule was recognized as late as 1932 and applied by this Court to certain Circuit Court rules relating to the assignment of United States Judges. *Johnson* v. *Manhattan Railroad Company*, 289 U. S. 479.

The regulations as promulgated, and certificates or policies of insurance issued by the Bureau of War Risk Insurance, and its successors, specifically recited that the maturity thereof because of the occurrence of "total and permanent disability" would be recognized to exist if and when the insured suffered certain specific disabilities from time to time enumerated in the contracts themselves or in regulations or instructions issued by the Director. This was in accordance with the terms of the statutes and of Bulletin #1, promulgated by the Bureau of War Risk Insurance Oc-

tober 15, 1917. All such changes, therefore, became embodied in all insurance contracts issued by the Bureau, irrespective of the date of issue.

The conclusion is irresistible that such specific loss provisions in said contracts and in the regulations and instructions on such subject were and are valid, and this Court should so hold.

Respectfully submitted.

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APPENDIX

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BULLETIN NO. 1

DIVISION OF MILITARY AND NAVAL INSURANCE

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

OCTOBER 15, 1917.

I, William C. De Lanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department', approved September 2, 1914, and for other purposes", approved October 6, 1917, hereby, on this 15th day of October 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

1. Insurance will be issued for any of the following aggregate amounts upon any one life:

* * * * *

which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability, for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for, in both cases except as otherwise provided.

2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates:

* * * * *

Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at net rates computed by the bureau according to the American experience table of mortality and interest at 3½ percent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(Form of policy for $5,000)

Military and Naval Insurance Policy

Amount, $5,000, No. 1. Age 25.
Monthly installments, $28.75.

THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:

Hereby insures from and after the ------ day of ----------, 19--, John Doe of Illinois, private, Company A Third Infantry, conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ percent per annum) payable—

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the in-

sured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all:

To Sarah Doe, wife of the insured—

If no beneficiary within the permitted class be designated by the insured, either in the insured's lifetime or by his last will and testament, or if any above-designated beneficiary is or becomes disqualified or does not survive the insured, the insurance (or if any above-designated beneficiary shall survive the insured, but shall not receive all the installments, then the remaining installments) shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the insured's place of residence be entitled to his personal property in case of intestacy.

If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.

This policy is not assignable, and payments thereunder to the insured or a beneficiary are not subject to claims of creditors of the insured or beneficiary.

The insured may at any time, subject to the regulations of the bureau, change the beneficiary or beneficiaries to any person or persons within the classes permitted by the act without the consent of the beneficiary or beneficiaries.

Upon the written request of the insured, accompanied by this policy for indorsement, or after his/her death, upon request of a beneficiary at the

time of making claim, the insurance payable to any beneficiary may be converted into installments of reduced amounts payable for 240 months certain and for as much longer as such beneficiary shall survive, such installments to be computed in accordance with the American Experience Table of Mortality and 3½ percent interest.

Premiums shall be paid monthly on or before the last day of each calendar month, and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

If the age of the insured has been misstated, the amount of insurance shall be adjusted at the

amount not in excess of $10,000, which the premium actually paid would purchase at the insured's attained age.

During the present war and for not more than five years thereafter, or until the earlier conversion of this policy, as hereinafter provided, the monthly premiums shall be in accordance with the following table of rates, increasing at each anniversary of the policy to the rate for his/her then attained age:

* * * * *

Not later than five years after the war this policy, if written request be made to the bureau therefor, accompanied by this policy, will be converted without medical examination into any form of insurance selected from among those that may be prescribed by regulations of the bureau. Such converted insurance will be at net premiums, computed in accordance with the American experience table of mortality and 3½ percent interest per annum and will provide for cash, loan, paid-up, and extended insurance values.

Wherefore the United States of America has caused this policy to be signed by the Secretary of the Treasury and by William C. De Lanoy, the

Director of the Bureau of War Risk Insurance, and countersigned by the registrar or an assistant registrar of the bureau.

W. G. McAdoo,
Secretary of the Treasury.

William C. De Lanoy,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C., this _____ day of _____, 19__.

_____,
Registrar.

(Here follows certain information pertaining to the provisions of the statute.)

Note.—Treasury Decision No. 18 does not contain a ruling of the Bureau but is a reprint of the Joint Resolution granting to certain persons an extension of time to April 12, 1918, in which to apply for insurance.

Treasury Decision No. 19 is not concerned with the military and naval provisions of the Act.

Nos. 18 and 19 are not being distributed.

(T. D. 20 W. R.)

Total Disability

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

Treasury Department,
Bureau of War Risk Insurance,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following

regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

An impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY, *Director.*

Approved:

W. G. MCADOO,
Secretary of the Treasury.

VETERANS' BUREAU REGULATIONS

(Compiled)

(Compensation Sections)

SEC. 1115. For compensation purposes a disability from an injury or disease shall be rated as

total and permanent under any of the following conditions:

(A) STATUTORY.—When a statutory permanent total disability entitles a person to such rating, viz: "loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden."

(B) WHEN SHOWN BY EVIDENCE.—When from the evidence submitted it is determined that there is present any impairment of mind or body which continuously renders it impossible for the average man to follow any occupation similar to that of the disabled veteran at the time of enlistment and which is founded upon conditions which render it reasonably certain that it will continue throughout the lifetime of the person suffering from it. The impairment in earning capacity in each individual case will not be considered so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. In arriving at a decision the average impairment in ability to secure employment which results from the service connection injuries will be considered.

Furthermore, permanent and total disability may be conceded in a proper case where there are present two or more disabilities, affecting entirely different functions, one of which is 65 percent disabling and which combined by present methods to 85 percent. These evaluations, however, upon which permanent and total disability may be con-

ceded are not intended to be rigid unalterable standards. They are city as illustrative and to be used as guides.

A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa (March 2, 1931).

Veterans' Bureau Regulations

(Compiled)

(Insurance Sections)

Sec. 3139. Any impairment of mind or body which renders it impossible for the disabled person (insured under yearly renewable term insurance) to follow continuously any substantially gainful occupation shall be deemed to be total disability. Total disability shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

Sec. 3140. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one

hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

U. S. GOVERNMENT PRINTING OFFICE : 1939

FILE COPY

Office Supreme Court,
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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

No. 342

MADISON L. MILLER, JR.,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

MOTION
and
ARGUMENT

of JAMES A. DRAIN, *National Judge Advocate,*
American Legion—AMICUS CURIAE

W. F. ROBERTS CO. WASHINGTON D. C.

IN THE

Supreme Court of the United States

No. 342

MADISON L. MILLER, JR.,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

Comes now James A. Drain, a member of the Bar of this Court, and files this motion and argument as amicus curiae in the above entitled and numbered cause, which was decided by this Court on March 4, 1935, and in which Petitioner has filed a motion for rehearing now pending before the Court.

The occasion and reason for the undersigned desiring to appear herein as amicus curiae is that he is National Judge Advocate of the American Legion, a national organization composed of World War veterans and existing by virtue of a corporate charter authorized by an Act of Congress.

Ever since its organization immediately following the cessation of hostilities in 1918, the American Legion has consistently urged veterans to convert and maintain in force insurance contracts issued to them by the United States, all of which contain the insuring provisions brought into question in the present suit. The American Legion has been concerned not only with the benefits thought to accrue to the veterans generally from such insurance, but also realized that in order to avoid large losses to the United States which would inevitably follow otherwise, it was necessary to encourage the maintaining of such insurance in force by a large number of eligible risks who were in first class condition and presumably would remain so for some years. Otherwise, the Government may be left with insurance on none but subnormal risks. The American Legion has cooperated with the Government in this respect to the extent of distributing large amount of literature and much personal solicitation of applications for said insurance, and without cost to the Government or the insured. Notwithstanding it is well known that practically all of the first year's premium and a substantial percentage of the premium for subsequent years is consumed in commercial insurance by commissions and other acquisition expense the Government has never incurred such acquisition expense.

Necessarily, the American Legion keenly feels its responsibility in having urged the veterans to apply for and maintain this insurance in effect and believes that a grave injustice will necessarily be done those who have so maintained their insurance over a long period of years if the Court's original opinion in this case is not withdrawn or its scope materially limited. The

seriousness of the situation is emphasized because in the years that have passed many of these policyholders have become bad insurance risks. In reliance on the Government contract they obtained, they have refrained from obtaining similar insurance coverage from private corporations at least to the extent of their assumed Government coverage.

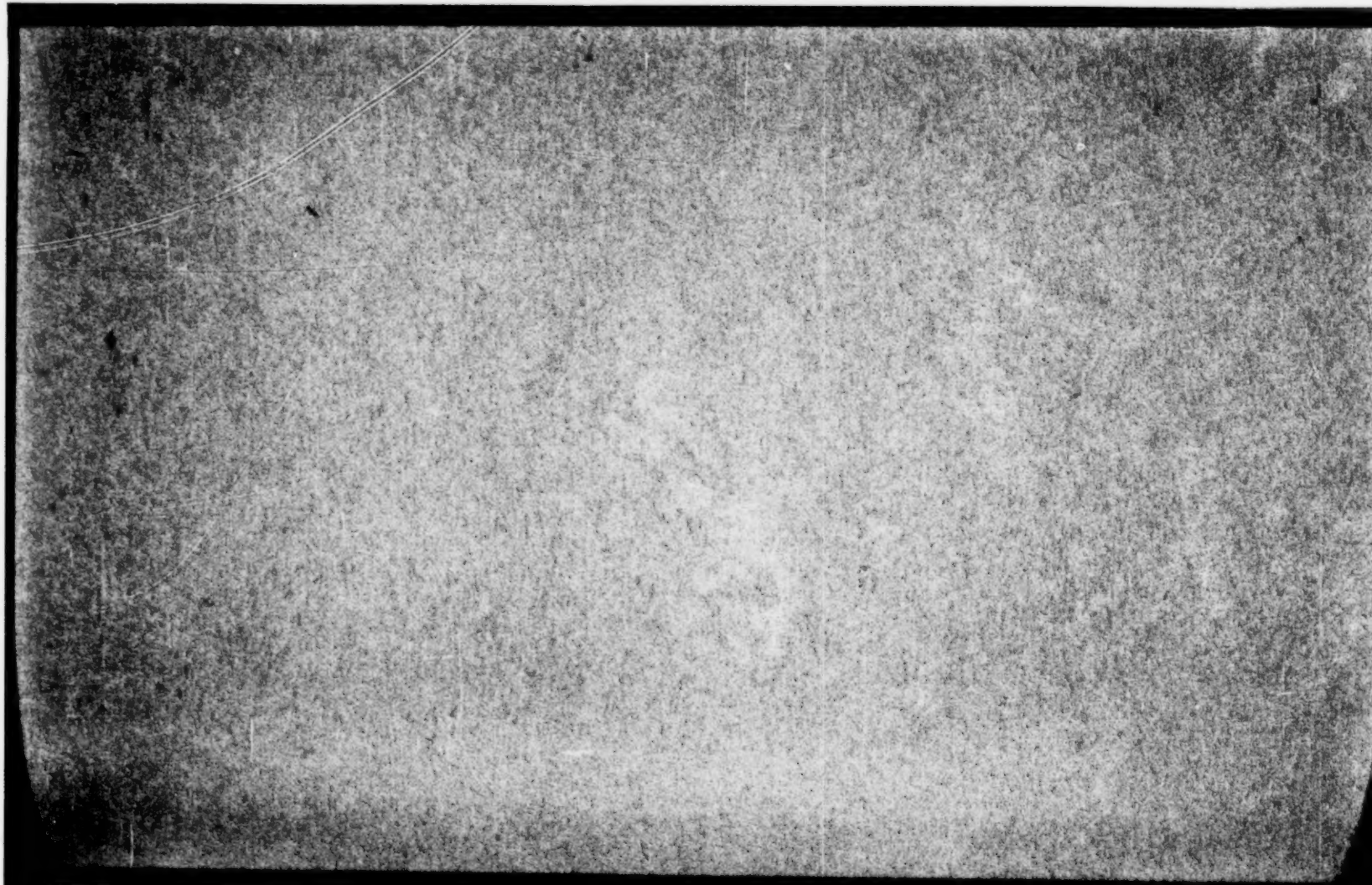
If the Court adheres to the views announced in the opinion in this case, there is no assurance that at a still later date some other provisions of the policy may not be invalidated. These men have contracted with their Government in reliance on what was thought a well settled rule of construction, to-wit: that long continued administrative construction and administrative action under a statute will be adhered to whenever the same is called in question in any court. If we are to depart from that principle now, the results will indeed be serious; so serious that the loss of this particular suit by Madison L. Miller, Jr., however important it is to him will become an insignificant detail as compared to the mischief which will thereby be wrought, and the doubt and uncertainty which will thereby be created in connection with the vast and increasing number of transactions of every character between the citizen and the numerous administrative officers of the Government.

The limited time available does not permit preparation and printing of an extensive separate argument.

Opportunity has been afforded the writer to collaborate in Petitioner's motion for rehearing in this cause and all of the points and arguments contained therein are hereby adopted and most earnestly urged upon this court as a part of this motion and argument.

It is, therefore, respectfully insisted that a reexamination of the logic, the authorities and the evil which necessarily will follow from the original views announced herein must and will lead this Court to withdraw its original opinion herein and adhere to the hitherto well settled doctrines indicated in said motion for rehearing. Such action is most respectfully urged.

JAMES A. DRAIN,
National Judge Advocate
The American Legion.



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FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934

No 342

MADISON L. MILLER, JR.,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONER'S MOTION FOR REHEARING

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

W. F. ROBERTS CO. WASHINGTON D. C.

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1. Director authorized by statutes to prescribe terms of contract, by regulation or otherwise.
2. Terms of contracts were determined from time to time by Director as authorized by Statutes.
3. That certain specific physical conditions should constitute "total permanent disability" as used in insurance contract was determinable by Director, and such determination is binding on parties to contract.
4. Validity and propriety of Director's action recognized by subsequent legislation reenacting without changes in this respect those portions of statutes under which determinations were made.
5. Administrative construction of various statutes for many years will not be disturbed by Court, especially when later amendments expressly provide the Director's "decisions of questions of fact and law * * * shall be conclusive." (Public 522—July 3, 1930.)
6. That Congress prescribed that certain specific disabilities should constitute "total permanent disability" for compensation purposes does not result in invalidating the determinations by the

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Director as to the disabilities which should constitute total permanent disabilities for insurance purposes.

Summary of argument on above 33

7. Contracts in question are by Statute and the terms of the contracts incontestable and hence the question is not open.

8. Cases cited in Court's original opinion herein distinguished and their inapplicability pointed out.

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IN THE

Supreme Court of the United States

October Term, 1934

No. 342

MADISON L. MILLER, JR.,

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vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITIONER'S MOTION FOR REHEARING

Comes now, Madison L. Miller, Jr., by his counsel, and moves this Honorable Court to grant a rehearing in this cause and thereupon set aside the judgment heretofore entered by this Court and reverse the judgment below, and assigns as cause therefor the following:

SUMMARY

1.

This Court apparently reached the announced decision in this case because certain principles either were not specifically called to the Court's attention, or were not emphasized as they should have been.

The undersigned counsel is perhaps subject to fair criticism for failing to call to the Court's attention and emphasize such principles. Such failure was due in part to oversight. It is believed the Court will not desire the Petitioner to be penalized and suffer a loss on this account. Neither will the Court desire to permit its opinion to stand unless upon a consideration of ALL the legal principles involved the Court feels certain its conclusions are correct. This is especially true in this case because the opinion materially affects several hundred thousand Government insurance contracts now in force, and in effect renders certain provisions therein contained inoperative. Such provisions are to the effect that the contract shall mature if the insured suffers certain amputations and other specific losses, named, including in the list the loss of use of one eye and one arm, and other similar combinations. It is believed the provisions in question are lawful and should be enforceable. Even if the Court should finally determine that under the facts of this case Petitioner may not recover, the scope and effect of the Court's opinion unquestionably should be very much narrowed, and in no event should the conclusions announced be applicable to insurance contracts containing the provisions in question on which contracts the Government has accepted premiums for many years.

Counsel desires to frankly state that some of the grounds on which the validity of the contract provision in question is based and which now appear to him as controlling were overlooked and did not come to his attention until he read a brief by the Solicitor of the Veterans' Administration filed in this Court

on the day the case was argued, which brief counsel urges the Court to read in connection with this motion for rehearing. Printed copies thereof are on file in the Clerk's Office. In the argument in support of this motion we have liberally copied therefrom.

2.

The Court failed to give effect to the statutory provisions empowering the Director of the Bureau of War Risk Insurance (and his successors) to prescribe the terms and conditions of the insurance contracts authorized by the War Risk Insurance Act, and the several Acts amendatory thereof.

3.

The Court failed to give effect to the authority conferred by statute upon the administrative officials to determine and prescribe the character and quantum of proof required to establish maturity of the insurance contract and to make reasonable rules in respect thereto.

4.

The Court failed to give effect to the legislative approval of the aforesaid rules and regulations implicit in the Congressional reenactments, over a period of many years, of various sections of the statute after the promulgation by the proper administrative officers of sundry regulations and instructions construing said sections. This legislative history demonstrates that the Congress approved and adopted the administrative construction in question.

5.

The decision herein is contrary to many prior decisions of this Court with respect to the effect to be given administrative construction of statutes over a long period of time.

6.

The question raised by the Government is not available because by the terms of the statute effective as of April 6, 1917, the insurance contracts (term as well as converted) were incontestable from their respective dates except upon certain grounds specifically enumerated in the statute, and a part of said contract.

7.

That the Court was not clearly informed as to the real question for decision is demonstrated by the fact that the cases cited in that part of the opinion relating to the supposed invalidity of the specific loss provisions in question are not in point on the real question involved, as is hereinafter specifically pointed out.

ARGUMENT UNDER FIRST TO FIFTH POINTS

In the Petitioner's brief and in the oral argument, the undersigned emphasized and probably emphasized too much the theory that because the statute provided that certain specific losses, including the loss of use of one arm and one eye as suffered by the Petitioner, should be considered permanent total disability for compensation purposes that it should be construed to also specifically authorize payment of insurance for such disability. This Court in its opinion in this case handed down March 4, 1935, ruled that this is not the proper construction of the statute. No

further reference to this theory will be made in the following argument which is urged in support of Petitioner's Motion for Rehearing. Counsel sincerely believes Petitioner is entitled to a judgment; but beyond this there is necessarily involved by reason of the broad language of the Court's opinion in this case matters of far more consequence than the question of whether Petitioner does or does not receive the money which he and his attorneys believe the Government owes him under the terms of the insurance contract involved. It is because of the importance of this question to the six hundred thousand or more present holders of Government insurance contracts and to the substantial number of other veterans who will be adversely affected by the opinion quite as much as the importance of the case to the Petitioner which impels us to present with all the earnestness and vigor possible the following reasons which we believe should convince the Court that its opinion ought to be modified. In addition to all other considerations, it is a serious matter indeed for the Court to anounce that over half a million contracts, promises of the United States Government, are unenforceable in whole or in part. The seriousness of this is emphasized when it is recalled that many of the present holders of such insurance contracts cannot procure insurance in private corporations (the contracts of which would contain language similar to if not identical with the question here involved) because in reliance on the Government contract they have permitted the time to pass during which they were insurable risks. Some of them have been paying premiums on the present contracts for fifteen years or more.

Furthermore, every effort should be made to encourage confidence in the promises of the United States Government and not create or increase doubt as to the reliability of the Government in respect to its undertakings. It is no answer to say that everyone is charged with knowledge that the agents of the Government act pursuant to limited powers and that those dealing with such agents must at their peril inquire into the details of the scope of such power. That principle could fairly be applied in respect of a purported contract clearly beyond the power of the agent or to a purported contract to mature or be performed within a limited time, or indeed if the question were raised within a reasonable time after the contract is made. But citizens have the right to rely upon the well settled rule of law often announced by this Court that settled administrative interpretations of statutes will be respected and enforced. That there is and has been such settled administrative interpretation here cannot be denied. It has extended over a period of two decades since the first War Risk Insurance Statute was enacted in 1914. Furthermore, the administrative construction, it is earnestly urged, is in fact correct.

A brief summary of the legislative history we believe demonstrates this.

The original statute enacted September 2, 1914, created in the Treasury Department the Bureau of War Risk Insurance and provided that said Bureau "shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes" against the risks of war (Section 2, 38 Stat. 711).

Section 4 of said Act provided that said Bureau, with the approval of the Secretary of the Treasury, "shall have power to make any and all rules and regulations necessary for CARRYING OUT THE PURPOSES of this Act." 38 Stat. 711.

The original Act was amended June 12, 1917, by Public, No. 20 of the 65th Congress. This amendment enlarged the scope of the insurance to include Masters, officers, or crews of American vessels, as well as vessels, their freights and cargoes. This insurance was to cover against loss of life or personal injury and for compensation during detention following capture by the enemy. 40 Stat. 102.

Section 4 thereof amended Section 3 of the prior Act and authorized the Bureau "to adopt and publish FORMS OF WAR RISK policies and to fix rates of premiums." 40 Stat. 103.

Section 5 added a new section to the prior Act, 3a, which provided that "Such insurance shall provide, * * * In case of death, or permanent disability which prevents the person injured from performing any and every kind of duty pertaining to his occupation, or THE LOSS OF BOTH HANDS, BOTH ARMS, BOTH FEET, BOTH LEGS, or BOTH EYES, OR ANY TWO THEREOF" for the payment of certain sums of money therein stated. 40 Stat. 103.

Paragraph (b) provided that for the loss of one arm 65% of the principal sum should be paid, and for the loss of one eye, 45% of the principal sum; total destruction of hearing 50%, etc. 40 Stat. 103. The Bureau was further authorized to "include in its policy undertakings to pay specified percentages of the principal sum for other losses or disabilities."

It will be noted that the percentage evaluation specified in the statute for the loss of one arm, and one eye, aggregates 110%.

Note that the language in said Section 5 necessarily recognizes that the specific losses therein described do in fact constitute or produce a kind of disability insured against, to-wit: total disability, permanent in nature. In other words, the specific losses described are synonymous with the expression "permanent total disability"; or (as used in Section 5 originally) "permanent disability which prevents * * * performing any and every kind of duty pertaining to his occupation." The citation of authority is unnecessary to support the statement that the two phrases just quoted are synonymous.

On October 6, 1917, there was approved an amendment to said Act of September 2, 1914, which not only extended the insurance to members of the military and naval forces, but provided for compensation and allotments and family allowances for the members of such forces. (Public 90, 65th Congress.) 40 Stat. 398. Section 13 of this Act of October 6, 1917, provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method

of taking and furnishing the same in order to establish the right to * * * compensation, OR INSURANCE provided for in this Act, * * * and the manner and form of adjudications and awards." 40 Stat. 399.

Pursuant to such authority the administrative officers did determine that proof of existence of any of the enumerated specific losses should be the quantum of proof necessary to establish maturity of the contract.

Section 20 appropriated certain sums and provided that "Payments from this appropriation shall be made upon and in accordance with awards by the director." 40 Stat. 400.

Section 400 (being the first section in Article IV of the Act of October 6, 1917) was the basic authorization for insurance to be issued members of the military and naval forces to cover "the death OR TOTAL PERMANENT DISABILITY of any such person." 40 Stat. 409.

Section 402 of said Act required the director to "promptly determine upon and publish the full and exact terms and conditions of such contract of insurance."

Bulletin No. 1 of the Bureau of War Risk Insurance was promulgated by the Director thereof October 15, 1917, pursuant to the afore-mentioned statutory requirements. There was incorporated therein a form of the policy as required which appears at pages 37 to 43 of the brief filed herein by the Veterans' Administration on the day this case was argued. It will be noted that this form provided that the insurance was granted subject to the above-mentioned statutes and *"of any amendments thereto and all regulations thereunder now in force or here-*

after adopted." It did not within its provisions define "total permanent disability," but simply stated that if the insured should become "totally and permanently disabled, *commencing with such disability as established by the award of the director* * * *."

The earliest form of converted insurance policy authorized and promulgated by the Bureau of War Risk Insurance (February 19, 1919) contains in paragraph 9 thereof a definition of "total permanent disability," upon the occurrence of which the contract matured. It is as follows:

> * * * Total permanent disability as referred to herein is an impairment of mind or body due to injury or disease, which will prevent the Insured from following continuously and permanently any substantially gainful occupation. Without prejudice to any other cause of disability, it is further agreed that the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles shall be considered as total permanent disability within the meaning of this contract. * * *

In March 1919 the Form of Policy just mentioned was revised somewhat. Paragraph 9 of this revised form defines "total permanent disability" as follows:

> Total permanent disability as referred to herein is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Without prejudice to any

other cause of disability, it is further agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet shall be considered as total permanent disability within the meaning of this contract. * * *

This is the Form No. 741, one of those mentioned in Treasury Decision No. 42, dated March 18, 1919, entitled: "Regulation Prescribing the Forms of Application and Policies to be used in the conversion of War Risk Insurance." Said Treasury Decision No. 42 recites that such form (and others therein mentioned) are "on file in the Office of the General Counsel of the Bureau of War Risk Insurance" and authorizes the making of contracts "under terms and conditions set forth therein." A specimen form of this contract is attached to this motion. This was little used in the early period because the "term" insurance was available and the premium thereon consumed much less of the meagre pay of a soldier. So far as the insurance coverage was concerned the "term" and the "converted" policies were identical. Only a "certificate" was issued on the former. A specimen thereof is attached to this motion. A specimen copy of the later form of policy (No. 735) is also attached hereto.

In the meantime, the statute was further amended by Public, No. 151 of the 65th Congress, 40 Stat. 555, approved May 20, 1918; but the above quoted and referred to portions of Section 13 of the Act of October 6, 1917, were reenacted without substantial change so far as the present question is concerned. Public, No. 175 of the 65th Congress, approved June 25, 1918, made sundry changes in various sections of

of the law but Section 402 was reenacted without substantial change so far as the present question is concerned.

On December 24, 1919, there was approved Public, No. 104 of the 66th Congress, 41 Stat. 371, which amended the statute in several respects. But the only change which is possibly relevant to the present question was contained in Section 11 thereof, amending Section 302 of the War Risk Insurance Act by providing (41 Stat. 373):

> That the loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total and permanent disability * * *.
>
> Congress is deemed to know of the administrative construction of the statutes during the preceding 26 months. Inferentially, it approved such construction.

In April 1920 the aforementioned Treasury Decision No. 42 was amended and new forms were substituted for those bearing the same numbers mentioned in Treasury Decision No. 42 of March 18, 1919,

> "which said new forms, and not those referred to in said Treasury Decision No. 42, shall be used in the conversion"

of the term insurance. The Form 741 filed with and referred to in said revised Treasury Decision 42 contained the following language in paragraph 9 thereof:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * *. *Without prejudice to any other cause of disability, it is agreed* that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, *or the loss of one hand and one foot,* shall be considered as total permanent disability within the meaning of this contract; * * *.

Although Congress has legislated on the subject frequently during the past fourteen years, there has been no statute indicating any dissatisfaction of the Congress with the terms of said contracts so promulgated by the Administrator pursuant to the directions contained in the statutes. There has been no narrowing of the language quoted in any of the thousands of contracts of insurance subsequently issued. Hundreds of claims have been asserted under such contracts, as well as under the term insurance which by virtue of the regulations promulgating the details of the contract, were to the same effect as the converted insurance contracts in this respect. At the present time the Veterans' Administration is paying, pursuant to administrative determination or judgments, 615 claimants under term insurance and 108 claimants under the converted insurance contracts for these so-called specific losses. These veterans have been paid in some instances over a period of many years, some of them since they were wounded during hostilities. Payments have been made in good faith by

the Disbursing Officers, audited and approved by the Comptroller General, and no effort made to perpetuate the evidence on which recovery might now be had on the basis suggested in the Court's opinion herein. If this opinion stands as announced, it is entirely conceivable that claim will be made against the Disbursing Officers for the moneys heretofore paid, against the sureties on their official bonds, and efforts also made to collect from these grieviously disabled veterans the sums heretofore paid them over a period of years pursuant to adjudications by the administrative officers of the Government. If gross injustice and mischievous results flow from a late construction of a statute differing from the long continued construction thereof by the administrative officers whose duty it is primarily to construe the same, those are additional reasons for strictly adhering to the well settled rule of this Court that the administrative constructions will be followed. Particularly is this true where Congress has legislated again and again on the subject without disturbing or changing in anywise such long continued administrative constructions. It is submitted and respectfully insisted that by reason of the legislative history of this matter Congress has approved and adopted, and in effect directly authorized, the language in dispute with reference to such specific losses under both term and converted insurance contracts.

On July 21, 1920, Regulation No. 54 was promulgated by the Bureau of War Risk Insurance, the first paragraph thereof providing that "awards of insurance and compensation shall be based upon the same standards." The remainder of the order relates to other procedural matters within the Bureau.

Regulation No. 57, promulgated by the Bureau of War Risk Insurance November 26, 1920, so far as material here, is copied on page 38 et seq. of the Solicitor General's brief. Attention is particularly invited to paragraph VII of said regulation, which provides that *awards of insurance may be "made in accordance with the provisions of paragraph IV" of such regulation.* Said paragraph IV is in subdivision B of the regulation. It reads:

> IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:
>
> (a) When a statutory total permanent disability entitles a person to such rating, viz, loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden.
>
> (b) .....
>
> (c) .....

Said regulation was approved by D. F. Houston, Secretary of the Treasury, on November 26, 1920.

A noteworthy circumstance in connection with this question is that for many years, with many officials considering the question from various angles, no one has entertained any doubt that as a matter of actual fact any person who suffered any of the *specific* losses mentioned in Regulation 57, or who had become "helpless and permanently bedridden," was, and necessarily must be, "totally and permanently disabled" for all purposes. It will be noted also that the conditions described in subparagraph (a) of para-

graph IV of said Regulation No. 57 are the identical conditions "deemed to be total and permanent disability" by the terms of paragraph 3, Section 302, of the War Risk Insurance Act as amended by Section 11 of Public, 104, 66th Congress, approved December 24, 1919.

This *fact,* however, does not support a *conclusion* that these specific losses were recognized to constitute "total permanent" disability for the reason that they were *also* recognized as applicable to compensation and were embodied in that portion of the statute relating to compensation. It is quite as reasonable to conclude they were so recognized for insurance purposes because they obviously did, as a matter of general knowledge and experience, produce such disability in one so afflicted. Common sense and the statute probably operated concurrently.

But, in any event, if the Director adopted for the purpose of insurance contracts the same standard of measurement for specific disabilities which Congress adopted for compensation purposes, it cannot be said the Director's determination was unreasonable. If reasonable, it was certainly within his power.

Evidently the then Director of the Bureau of War Risk Insurance followed the well-settled construction of the expression "total permanent disability" as reflected in numerous decisions by the State and Federal courts prior to the enactment of the statute under consideration.

Public No. 47, of the 67th Congress, approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau, and by Section 3 thereof

> The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau * * * (42 Stat. 148).

Section 404 of Public No. 47 relates to the conversion of the term insurance theretofore written *"into such form or forms of insurance as may be prescribed by regulations and as the insured may request."* Throughout said Act large discretionary powers are vested in the Director of the Veterans' Bureau and extensive authority is granted to him with respect to the promulgation of regulations pertaining to the subject matter within his jurisdiction.

Here again after the administrative practice in question was well established Congress not only implicitly but expressly approved the existing practice. We respectfully insist that the specific loss provisions became a part of the contract, and with the approval of the Congress, quite as much as if the statute had expressly provided that the forms of policies then in use were to constitute the contract.

Pursuant to the authority contained in said Act of August 9, 1921, the Director of the Veterans' Bureau, on September 12, 1921, promulgated "Veterans' Bureau Regulation No. 4." Its terms, so far as this question is concerned, are the same as subparagraph (a) of paragraph IV of said Regulation No. 57. The first sentence of paragraph VII of Regulation No. 4 is identical with the corresponding sentence in Regulation No. 57.

Section 300 of the World War Veterans' Act, approved June 7, 1924, (Public 242, 68th Congress, 43

Stat. 607, 38 U. S. Code 193 et seq.) relates to insurance and is in substantially the same language as the prior Acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout viz: "total permanent disability."

Again Congress approved the practice which had been in existence for years and it must be borne in mind that the World War Veterans' Act of 1924 followed extensive hearings and investigations on the entire subject of veterans' relief and veterans' insurance and that Act in effect was a codification of what Congress deemed appropriate after a complete overhauling of all existing legislation on the subject of World War veterans. This is significant, and negatives the thought that there may have been any oversight by the Congress in connection with the present subject.

This Act also amended Section 202, and added a specific loss to those enumerated in Section 202 as it appeared in the Act of June 7, 1924, quoted above, to wit: "the organic loss of speech."

Sections 202 and 301 were again amended by Public No. 585 of the 70th Congress, approved May 29, 1928 (45 Stat. 964), but the same description of the loss insured against to wit, "total permanent disability" was used and the language of Section 301, with

respect to the forms of insurance, being those prescribed by regulation, remained unchanged.

Public 522 of the 71st Congress, approved July 3, 1930 (46 Stat. 991), again amended the World War Veterans' Act in sundry respects. The first Section of that Act amends Section 5 of the Act of June 7, 1924, and as amended it reads:

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and SHALL DECIDE ALL QUESTIONS arising under this Act * * *." There was an exception, permitting suits on insurance contracts.

The specific losses (amputations, blindness, etc.) enumerated in the World War Veterans' Act of June 7, 1924, and the amendments thereto, as indicated above, are identical with the specific losses enumerated in Section 3122 of the Veterans' Bureau Regulations, pertaining to converted insurance, and 3140 thereof, pertaining to term insurance. These Regulations were promulgated in March 1930.

They were in substance the same as all of the preceding regulations so far as the principle is concerned, the various changes during the preceding decade being largely verbal except at different periods different combinations of specific losses were prescribed. The administrative officers were entitled to believe that these regulations were in accord with the intention of the Congress in view of the fact that

with full knowledge of the well established practice which had then existed for more than a decade Congress reenacted the insurance provisions without substantial change so far as this question is concerned.

It is apparent that the genesis of all these specific loss provisions was the Act of June 12, 1917 (40 Stat. page 102) amending the War Risk Insurance Act of September 2, 1914, and providing for payment of the principal sum or certain portions thereof to seamen on merchant vessels who suffered similar specific losses; plus the exercise by the Director of the authority vested in him to determine the terms of the contract. He determined that these specific losses which the Congress had previously said constituted permanent total disability in connection with other matters and which as a matter of general knowledge did and do constitute such disability should expressly be recognized so to do. Having recognized that fact it was so provided in the contract and we respectfully insist it was properly so provided therein.

It should be reiterated here that the fact that Congress concluded certain specific losses constituted permanent total disability for compensation purposes and that the Secretary of the Treasury and his successors reached the same conclusion with respect to the same specific losses in dealing with the subject of the insurance contracts, does not demonstrate that the latter conclusion was reached because of the former, nor is it believed that if it were reached for that reason that fact would mitigate against the validity of the specific loss provisions in the insurance contracts.

Nowhere in any of the numerous changes in Regulations, the numerous amendments and reenactments of various statutes on the subject, or in the several re-

visions of the insurance contracts themselves, or in the legislative or administrative history in connection with any of these changes, does there appear to have been at any time during the period of approximately twenty years since the first enactment on the subject, any doubt in the mind of any official concerned with the subject as to the legality and propriety of the provisions now under discussion, to wit, the specific loss provisions in the insurance contract.

Aside from any purely technical or abstract reasoning that may be indulged in, it is submitted that it is not the function of any Court upon a review of administrative action to simply substitute its judgment for that of the administrative officer in matters with respect to which discretion has been confided in him. That principle is well settled by decisions of this Court, as well as all other courts which have ever passed on the question. To hold such administrative regulations invalid it must appear that it was *clearly* beyond the power of the Administrator under the statute or that it was action involving the arbitrary exercise of a power. It is clear that the practical functioning under a statute is to be considered by the administrative officers charged with its interpretation and enforcement, as well as the purely abstract principles involved. It is submitted that there is nothing unreasonable in the administrative interpretation now under attack. No one would seriously question the propriety of instructions to rating boards to the same effect, e.g., if you find this condition or that condition of health to exist you will deem the evidence sufficient and will not look further. There is no difference in substance or effect. All persons would say without any hesitancy that in practically

all cases one suffering the loss of both legs, the sight of both eyes, or of one leg and one arm, etc., is in fact totally disabled. This is true notwithstanding the fact that occasionally one so afflicted but who is endowed with very exceptional talents may be able to compete with his fellows and earn some sort of a living, and occasionally one is found who earns a reasonable living. But there is only one Helen Keller and her accomplishments cannot be used as a practical measuring rod in handling hundreds of thousands of insurance claims. Nor is it any answer to the proposition just indicated to say that some blind men operate cigar stands in public buildings and presumably live on the income therefrom. Their capital and the opportunity to so utilize it is the dominant factor in such cases, not their personal effort. If the provision is reasonably within the scope of the statutory authority, which is very broad, or if there be reasonable doubt about its being within the scope of such authority, then the provisions in these contracts are valid and this Court should so hold.

The other provision contained in the specific loss section of the Government insurance contract, to wit, "becoming permanently helpless or permanently bedridden," hardly calls for comment except to say that one could not imagine any case where an insured so afflicted would not be entitled to recover on an insurance contract insuring against total permanent disability, quite aside from the incorporation of any such language in the contract.

It is believed that so far as the scope of the risks covered is concerned there is no difference between the present situation and that intended to be created by the early enactments of Congress pertaining to

insurance (term insurance). In short, "the insurance" about which Congress legislated more or less continuously from 1914 to 1930 was a contract relating to that type of relationship generally understood as created and existing between the insurer and the insured with respect to the "coverage," or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally incapacitate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." The expression has been so often discussed and defined that we will not burden the Court further in respect thereto. If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a practical and not a theoretical or abstract problem. It seems entirely clear that Congress intended for a contract to be made for practical purposes. It follows that the terms therein, the construction thereof, and the adjudication of claims arising thereunder should be reasonable, businesslike, and practical.

It is submitted that under the broad authority and power granted to the Secretary of the Treasury in the earliest enactments, and to his successors by the later enactments, it is entirely clear that such officials could properly make the contracts they did make, and which included the so-called "specific loss provisions"; and further, that without any such provisions in the contracts, such officials could properly have adjudicated claims upon the standards indicated. Some standard for the guidance of the subordinates actually doing the rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court, as has been held in many cases. A few citations will suffice.

In the case of *Hahn* v. *United States,* 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper constructions of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> had not interfered with such constructions by the Secretary of the Treasury while the Act was in force.

This was in accord with the cases of *United States* v. *Pugh,* 99 U.S. 265, wherein this Court in the course of its opinion observed—

> In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect.

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court

denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be ACTED UPON FOR A NUMBER OF YEARS, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are con-

strained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States,* 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time. A "draw back" under the customs act was there involved. In the course of the opinion, after restating the rule above indicated, this Court said:

> To this we must add that the department's interpretation of the statute has had such implied approval by Congress, that it should not be disturbed * * *. The draw back provision under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870 and the Court of Claims finds that the rule for determining the draw back on oil cake was applied during the whole of that period of almost ten years * * *. The reenacting of the draw-back provision four times without substantial change, while this method (i.e. departmental formula) of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. * * * (Citing cases) * * * for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government.

Attention is invited to the fact that the Secretary of the Treasury and his successors uniformly construed the insuring provisions in question from the beginning of operations under the Act of October 6, 1917, amending the original War Risk Insurance Act of September 2, 1914, as will be noted from the detailed history of the legislation hereinabove pointed out. Congress legislated on this subject almost continually. Various Sections of the Statute affecting the subject matter presently in issue were from time to time amended and rewritten. But nowhere has Congress during the intervening period of nearly twenty years indicated, directly or by implication, that the construction by the Secretary of the Treasury, and by the administrative officers successively performing the functions originally vested in the Secretary under the War Risk Insurance Act, was erroneous or contrary to the congressional intent. On the contrary, the terms of the contracts of insurance, as determined upon and adopted by the Bureau of War Risk Insurance and its successors, have received the sanction of legislative approval by Congress by virtue of the successive reenactments of the various sections of the statute after the construction thereof now questioned had been adopted by the administrative officials.

Express approval by Congress, and express confirmation of power vested in the Director (now Administrator) is manifested by the July 3, 1930, amendment to Section 5 of the World War Veterans' Act. (Section 1, Public 522, 71st Congress, 46 Stat. 991.)

The first sentence of that section as amended July 3, 1930, reads:

SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact AND LAW affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. * * *

The language is identical with the original Act of June 7, 1924, except that the words "and law," appearing in capitals in the above quotation were added by the Act of July 3, 1930. It is believed the power and the right now asserted clearly existed theretofore, but if there existed any doubt on that point, certainly all such doubt was removed upon the approval of said Act of July 3, 1930.

Clearly, somebody was charged with the duty of determining the exact terms of the contract by Congress authorized and which was to be sold to several million men, comprising the military and naval forces of the United States. The power and authority to determine these terms of the proposed contract was vested in the Secretary of the Treasury (Bureau of War Risk Insurance). Necessarily, the exercise of such power involved some considerable discretion. The purpose, as declared by Congress, was to insure against two certain contingencies, one described in very general terms. The happening of those contingencies necessarily had to be determined; and in cases of disability, the extent thereof ascertained. In

the nature of things determination in the individual cases must be done by numerous subordinate officials and employees. It should not be left to the mere whim or the individual opinion of such adjudicating personnel. Certain more or less definite rules of measurement were indispensable. These rules, the Secretary of the Treasury and his successors determined upon and promulgated as contemplated and provided by Congress, and such rules became, were, and are those reasonable "rules and regulations not inconsistent with the provisions of this Act necessary or APPROPRIATE to carry out its PURPOSES," authorized by Section 13 of the Act of October 6, 1917. (40 Stat. Part 1, 398.)

They and their amendments, whether incorporated in regulations, denominated as such, or in the "policy" or contract, constituted the reasonable "rules and regulations" authorized in the successive acts from 1917 to the present which dealt with the subject matter of the present litigation. The reasonableness of the specific loss provision promulgated by the Secretary and his successors is illustrated by the fact that Congress provided, in dealing with such specific losses in the case of seamen (in the Act of June 12, 1917, 40 Stat., Part 1, page 102), that 65% of the principal sum of the insurance contract should be payable for the loss of one arm and 45% thereof for the loss of one eye. During the many years this insurance has been in effect, and in spite of the numerous cases disposed of administratively and as the result of litigation, the validity of the so-called "specific loss provisions" of the insurance contract has not heretofore been questioned. In the opinion of the Circuit Court of Appeals for the Sixth Circuit in *United States* v.

Cole, 45 F. (2) 340, they were *assumed* to constitute part of the contract.

The rule indicated by this Court in numerous decisions, a few of which have been cited, has been recognized as applicable to the administrative practice of the Veterans' Bureau (Successor to the Bureau of War Risk Insurance). Attention is invited to page 146, volume 35, Opinions of the Attorneys General of the United States, where, in an opinion by the Attorney General, it is stated:

> "* * * I am informed that the Veterans' Bureau has construed compensation remaining uncollected to which a veteran is entitled at the time of death or permanent total disability as including compensation which is uncollectible at that time because of section 210, and has acted upon this construction in a large number of cases.
>
> If the construction placed upon a statute by the Department charged with its administration is not clearly erroneous, and has been followed in many cases, it should be respected and not overruled except for cogent reasons. * * *"

On February 28, 1933, the Attorney General addressed an opinion to the Administrator of Veterans' Affairs, relative to the naval pension payable under Sections 4756-7 of the Revised Statutes. In the course of this opinion the Attorney General stated:

> I have examined the question on the merits and it is obviously a debatable one. * * * I have adhered very strictly to the rule that wherever there is room for reasonable differences of opinion as to the meaning of a statute, long and consistent administrative interpretation of it by the officers charged with the duty of

> administering it should be followed. I have repeatedly urged that contention before the courts in Government litigation. It is undesirable from many points of view to overturn long-continued administrative practices based on an administrative construction of a statute. It appears in the present instance that the practical construction heretofore followed has been adhered to for a number of years and that *the Congress has not been dissatisfied with it or seen fit to modify it by legislative enactment.* * * *

The rule was recognized as late as 1932 and applied by this Court to certain Circuit Court rules relating to the assignment of United States Judges. *Johnson* v. *Manhattan Railroad Company,* 289 U. S. 479.

The regulations as promulgated, and certificates or policies of insurance issued by the Bureau of War Risk Insurance, and its successors, specifically recited that the maturity thereof because of the occurrence of "total and permanent disability" would be recognized to exist if and when the insured suffered certain specific disabilities from time to time enumerated in the contracts themselves or in regulations or instructions issued by the Director. This was in accordance with the terms of the statutes and of Bulletin No. 1, promulgated by the Bureau of War Risk Insurance October 15, 1917. All such changes, therefore, became embodied in all insurance contracts issued by the Bureau, irrespective of the date of issue.

The various regulations so far as material are printed in the appendices to the brief heretofore filed by the Veterans' Administration and the "Brief for the United States" filed by the Solicitor General.

The Court is respectfully referred thereto inasmuch as those exhibits have not been reprinted in connection with the Motion in view of the cost thereof.

It is respectfully insisted that the specific loss provisions in question are valid because:

a. Of the statutory authority extended to the Director of the Bureau of War Risk Insurance and his successors, to prescribe the terms and conditions of the insurance contracts.

b. They are within the authority extended by the statute to said administrative officials to prescribe the character and quantum of proof required to establish maturity of the insurance and to make reasonable rules in respect thereto.

c. The Congress has over a period of more than 15 years legislated again and again on the subject in the light of the current administrative interpretations and thereby approved and adopted the same as part of the statute.

ARGUMENT UNDER SIXTH POINT

There is another basis for sustaining the validity at this time of the specific loss provisions in both the term and the converted insurance contracts. Section 307 of the World War Veterans' Act, as amended by Section 24 of Public 522, approved July 3, 1930 (46 Stat. 991) provides:

"All contracts or policies of insurance HERETOFORE OR HEREAFTER issued, reinstated, or converted, SHALL BE INCONTESTABLE FROM THE DATE OF ISSUANCE, reinstatement, or conversion, except for fraud, nonpayment of premiums, or

> on the ground that the applicant was not a member of the military or naval forces * * * this section shall be deemed to be effective as of April 6, 1917, and APPLICABLE FROM THAT DATE to ALL contracts or policies of insurance."

Said section by its terms is subject to Section 23 of the World War Veterans' Act. So far as material Section 23 provides:

> "* * * no compensation or insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy * * * the discharge of a person for having concealed the fact that he was a minor at the time of his enlistment shall not bar him from the benefits of this Act * * * this section shall be deemed to be in effect as of April 6, 1917 * * *."

Formerly Section 307 provided that the insurance should be incontestable "after the insurance *has been in force six months* from the date of issuance or reinstatement * * *," and also that a letter mailed by the Bureau should constitute a contest. This latter provision undoubtedly was incorporated to meet the decision of this Court in *Hurni Packing Company* v. *Mutual Life Insurance Company*, 263 U. S. 167; 68 Law Ed. 235. It was therein held that the contest must be initiated within the period provided in the policy, notwithstanding that death occurred prior to the expiration of such period. But said provision for a letter of contest was eliminated when Section 307 was amended in 1930, as indicated above.

As far as we can discover there is only one decision in the United States directly in point, presumably because the conclusion therein indicated is so mani-

festly correct that counsel for other insurance companies never thought it worthwhile to litigate the question. We refer to *Mutual Reserve Fund Life Association* vs. *Austin*, decided by the Circuit Court of Appeals for the First Circuit in December, 1905, 142 Fed. 398. Suit was brought to recover the face amount of a life insurance contract which contained this provision:

> "If this policy of insurance shall have been in continuous force for three years from its date, it shall therafter be incontestable except for nonpayment of premiums * * * or for misstatement of the age * * *."

It also contained a provision as follows:

> "This contract shall not take effect until this policy is delivered to the member in person during his lifetime and while in good health, nor until the first payment is paid in cash hereon while said member is also in good health."

The undisputed facts showed that the deceased insured was not in good health at the time the contract was delivered to him. He died nore than three years after the date thereof. Judgment for plaintiff was affirmed. The Court said (Page 401):

> "The term incontestable is of great breadth. It is the policy which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause. * * * The word policy may well be taken to mean a formal document delivered by the company and containing evidence of an obligation to pay * * *."

It will be observed that Section 307 above provides that "all contracts or policies of insurance * * * shall be incontestable from the date of issuance." Formerly in the 1924 Act the language read: "shall be incontestable after the insurance *has been in force six months* from the date of issuance * * *," practically the same language as in the Austin case cited.

This change in the language in 1930 indicates an intention by the Congress to liberalize the incontestable provision so as to make it more desirable to the insured. It also is further evidence of Congressional approval of the then existing terms of the insurance "contracts or policies" which had long been in existence pursuant to the administrative officers' determination thereof.

In the case of *Northwestern Mutual Life Insurance Company* v. *Johnson*, 254 U. S. 96; 65 Law Ed. 155, this Court affirmed a judgment for the plaintiff, beneficiary under two life insurance policies. Payment was contested on the ground that the insured suicided. The language most favorable to the insurer was:

> "If within two years from the date hereof the said insured shall * * * die by his own hand * * * this policy shall be void."

The other policy provided:

> "This contract shall be incontestable after one year from the date of its issuance provided the required premiums are duly paid."

After pointing out that the case of *Ritter* v. *Insurance Company* 169 U. S. 139, had been modified by the decision in *Whitfield* v. *Insurance Company,* 205 U. S. 489, this Court, answering a certified question, held the insurer was liable under both contracts. The insured had suicided at a date more than two years after the first policy and more than one year after the second policy was issued. The Court said:

> "The object of the clause is plain and laudible—to create an absolute assurance of the benefit as free as may be from any dispute of fact except the fact of death and as soon as it can reasonably be done."

It further held that the two quoted clauses were the same in effect and that each policy was incontestable after the period stated therein.

It seems clear that under the express terms of the statutes cited providing that these policies should be incontestable from their dates that it is not now open to the insurer (the United States) to contest the validity of the specific loss provisions. And it will be noted that the incontestable section of the statute is expressly made effective as of April 6, 1917.

ARGUMENT UNDER SEVENTH POINT

The Court cites several cases in its original opinion herein. But it is believed the principle announced in those cases is inapplicable here for the reasons hereinafter indicated as to each of such cited cases.

The case of *United States* v. *200 Barrels of Whiskey,* 95 U. S. 571, 576, construed the forfeiture

provisions contained in two separate sections of a Revenue Act. Under one section the whiskey contained in the unstamped container was forfeited by reason of the failure to stamp such container. Under another section of the Act all the whiskey on the premises under certain circumstances was to be forfeited. The Commissioner issued certain regulations which it was claimed authorized the destruction of all the whiskey if any of it was found in an unstamped container. Obviously, such regulation was not construing the law at all but was in effect repealing the limited forfeiture section and making the general forfeiture section applicable in the unstamped container cases, and this in the face of the statutory provision that if that were the only offense the forfeiture should be limited to the contents of such container. Incidentally, that case involved a highly penal statute, a forfeiture of the citizens' property and naturally the statute should and would be strictly construed.

In *Morrill* v. *Jones,* 106 U. S. 466, 467, there was involved the validity of a customs regulation to the effect that before admitting certain alleged breeding animals free of duty the Collector must "be satisfied that the animals are of superior stock, adapted to improving the breed in the United States." The statute provided for free importation of male animals if they were "imported for breeding purposes." Plaintiff imported certain animals "for breeding purposes" but the Collector thought that these animals were not of superior stock and were not adapted to improving the breed in the United States and, therefore required payment of duty. The im-

porter brought this suit to recover the amount so paid under protest. Here again it is perfectly obvious that the regulation directly and materially changed (by limitation) the statutory provision in two respects:

a. The Collector must be satisfied that the animals were of superior stock, and
b. Were adapted to improving the breed.

In *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610, there was involved the validity of an attempted action by the Commissioner of Internal Revenue purporting to terminate alcohol permits of various concerns. Such permits were issued under the provisions of the National Prohibition Act and were continuous in effect until certain violations by the permitees. The Commissioner promulgated a regulation purporting to terminate the permits on a certain date and changed the scheme to one involving periodical procuring of permits. This again is in the nature of a penalty statute and has no application to our situation, since it did not involve the *construction* by the Commissioner of the statute or the prescribing of any duties in accordance with any section of the statute but simply *undertook to terminate a right* theretofore secured by the plaintiffs pursuant to the statute.

In *United States* v. *Grimaud*, 220 U. S. 506, this Court reversed a judgment which had sustained demurrer to an indictment returned against the defendant for grazing stock in Public Forests without first procuring a grazing permit from the Secretary of the Interior as required by a statute. The sole point decided in that case was that Congress had the power

to create a criminal offense and provide a penalty therefor which offense should consist of violating a rule or regulation to be issued by the administrative officer having jurisdiction over Public Forests. These rules pertained to the number of sheep, goats or cattle that might be grazed in a given area and under what circumstances, etc. It is submitted the decision does not bear on the present problem at all. If any inference applicable to this case could be drawn from that decision it would seem to be that Congress had the power to confer upon the Administrator of Veterans' Affairs the right to prescribe the terms of the insurance contracts in question. Obviously, it did have such power and that has not been questioned. We submit most earnestly that he has exercised the power within its scope and that in the exercise thereof such administrative officer determined that one of the terms and conditions of the contract should be the so-called specific loss provision. We further insist that such provisions are valid, whether called in question with respect to the term insurance or the so-called converted insurance.

The conclusion is irresistible that such specific loss provisions in said contracts and in the regulations and instructions on such subject were and are valid. This Court, therefore, should grant this motion for rehearing and so hold.

Respectfully submitted.

WALLACE MILLER
JAS. A. LOWREY, JR.
F. L. CLEMENTS
Attorneys for Petitioners

The undersigned attorneys of record for Madison L. Miller, Jr., the Petitioner in the above entitled cause, hereby certify that the foregoing Motion for Rehearing on behalf of said Petitioner is presented in good faith for the purpose of seeking correction by this Court of the errors which the undersigned believe were committed to the prejudice of Petitioner and same is not presented for purposes of delay. This certificate is made pursuant to Rule 33 of this Court.

WALLACE MILLER
JAS. A. LOWREY, JR.
Attorneys for
Madison L. Miller, Jr.,
Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1934.

Madison L. Miller, Jr., Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 4, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner enlisted in the United States Army June 7, 1917, and was honorably discharged April 3, 1919. On January 22, 1918, there was issued to him a war risk insurance policy, by the terms of which he was entitled to receive $57.50 per month in the event of his sustaining injuries causing total and permanent disability. No premiums were paid after the date of his discharge, and the policy then lapsed. Claim was made for insurance on June 5, 1931, twelve years later. The claim was disallowed by the Administrator of Veterans' Affairs on April 1, 1932. Thereupon, this action to recover judgment upon the policy was brought.

The facts upon which the action is based follow: On October 26, 1918, while in active service in France, petitioner sustained injuries in a railway accident resulting in the amputation of his right arm. He alleges that, for all practical purposes, the sight of his left eye was destroyed at the same time. Although the evidence shows that the defective condition of the eye was congenital, no point is made in respect of that fact; and for present purposes we put it aside. At the conclusion of the evidence before the trial court, the judge sustained a motion of the government for a directed verdict, on the ground that the injuries did not, as a matter of law, result in total and permanent disability. Verdict and judgment followed accordingly. The Court of Appeals affirmed the judgment, 71 F. (2d) 361, and we brought the case here on certiorari.

Article III of the Act of 1917 (c. 105, 40 Stat. 398, 405) relates to compensation for death or disability. The provisions in respect of insurance are dealt with separately (p. 409) in Article IV of the

act; and this separation of the two subjects has been maintained in subsequent acts. The provision in respect of insurance (p. 409) is that upon application to the Bureau, the United States "shall grant insurance against the death or total permanent disability" of enlisted men and other classes of persons named in the act. The provision of the act (§ 302) with respect to compensation was enlarged by the amending act of December 24, 1919, c. 16, § 11(3), 41 Stat. 371, 373, so as to bring conclusively within the term "total permanent disability" the loss of one hand and the sight of one eye; and this has since remained the law. No such amendment was carried into the insurance article of the act; and, in that respect, the statute has never been changed.

Section 13 of the 1917 act, as amended, c. 77, 40 Stat. 555, confers upon the Director of the Bureau authority to make such rules and regulations, not inconsistent with the provisions of the act, as may be necessary or appropriate to carry out its purposes. Under that provision, a regulation was issued March 9, 1918, declaring—"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability." It was while this regulation was in effect that § 302 of the act was amended, as stated above, to provide in respect of compensation that the loss of one hand and the sight of one eye should be deemed total permanent disability. In May, 1930, Regulation 3140 was promulgated. That regulation, among other things, declares that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance."

Succinctly stated, petitioner contends (1) that § 302, as amended, applies to war risk insurance as well as to compensation allowances; (2) that regulation 3140 is within the power of the Administrator of Veterans' Affairs (who succeeded the Director of the Bureau), and controls the present case; and (3) that, the foregoing aside, the evidence was sufficient to justify a verdict in his favor.

First. The argument as to the first point, in brief, is this: The amendment to the compensation article of the act, adopted in 1919, must be construed and applied in the light of the regulation of March 9, 1918, of which regulation congressional knowledge and approval are to be assumed. By that regulation, the bureau

adopted a uniform rule applicable alike to compensation and insurance; and, the contention seems to be, since Congress did not by express words limit the operation of the amendment of 1919 to compensation, it is fair to conclude that it was intended that the amendment, conforming to the principle of the regulation, should apply to both compensation and insurance. We see no warrant for that conclusion. When the regulation was adopted, neither Article III nor Article IV contained any specific provision in respect of the disabling effect of the loss of one hand and the sight of one eye. By the amendment, not only was the formal expression of the new rule confined to Article III, but the opening words of the amendment quite clearly indicate a legislative intention to confine its application to that article. These words are—"If and while the disability is rated as total and permanent, the *rate of compensation* [italics added] shall be $100 per month", etc. It is hard to see why the intention of Congress to limit the operation of the amendment to compensation allowances is not thus definitely and clearly manifested.

Second. Regulation 3140 was not adopted until eleven years after the insurance policy had lapsed and petitioner's cause of action thereon had fully matured. Undoubtedly, the regulation in terms declares that permanent loss of the use of one hand and one eye shall be deemed to be total permanent disability under an insurance policy such as that issued to petitioner. But the regulation is both inapplicable and invalid.

It is inapplicable because it contains nothing to suggest that it was to be given a retrospective effect so as to bring within its purview a policy which had long since lapsed and which had relation only to an alleged cause of action long since matured. The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears. *Twenty per Cent. Cases*, 20 Wall. 179, 187; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *Fullerton Co.* v. *Northern Pacific*, 266 U. S. 435, 437. The principle is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only.

It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator)

to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that *in respect of compensation allowances,* loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it. *United States* v. *200 Barrels of Whiskey,* 95 U. S. 571, 576; *Morrill* v. *Jones,* 106 U. S. 466, 467; *United States* v. *Grimaud,* 220 U. S. 506, 517; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610.

Third. The burden was on petitioner not only to show the character and extent of his injury, but also to show that the result of the injury was to disable him permanently from following any substantially gainful occupation. *Proechel* v. *United States,* 59 F. (2d) 648, 652; *United States* v. *McCreary,* 61 F. (2d) 804, 808. Petitioner lost his right arm; and the proof shows that he had been right-handed. Before the injury he was a practical engineer operating a surveying instrument; but with the loss of his right arm he could not operate such an instrument. In 1919 he obtained employment in a packing house, but found himself unable to retain the employment because it necessitated lifting heavy quarters of meat which he could not do with one arm. He was also unable to take orders for the house because he could not hold the receiver of the telephone and write orders at the same time. After three weeks, he was obliged to give up this employment. From time to time, he obtained other work which involved the use of both hands and which he was obliged to abandon. On the other hand, it appears that he worked for twenty-two months in the business of selling stocks on commission, and for a few months in that of selling goods, from neither of which he received much in the way of income—not because his injury incapacitated him for the work, but because he lacked ability as a salesman. It does not

appear that he made any earnest endeavor to fit himself for this work, or any effort to engage in other work which ordinarily a one-armed man with one defective eye could do. See *United States* v. *Thomas*, 53 F. (2d) 192, 195. He testified that he had received an average of $90 a month from the government as compensation since his discharge. He also received $2,500 from the sale of a farm in which he had an interest. He was, therefore, not without resources with which to obtain proper training. It does not appear that he undertook to do so. It is by no means infrequent for one-armed men to make a good living and support others by performing work adapted to their condition. It is clear from the evidence that the failure of petitioner in some of the things he undertook to do was not because of his crippled condition, but because of his general inaptitude for the work. The mere fact that he was unable to follow the occupation of surveyor or to do work of the kind he had been accustomed to perform before his injury does not establish the permanent and total character of his disability. *Lumbra* v. *United States*, 290 U. S. 551, 559. His long delay before bringing suit is wholly incompatible with a belief on his part that he was totally and permanently disabled during the period while his policy was in force. *Idem*, p. 560; *United States* v. *Hairston*, 55 F. (2d) 825, 827. If petitioner thought himself totally and permanently disabled, it is difficult to understand why he waited twelve years before attempting to assert his rights. The only explanation he makes for his delay is that he thought a man had to die to get the insurance. How he discovered his error after the extraordinary lapse of time indicated above we are not told. He was intelligent, had completed the third grade at high school, and a year at military school. It does not seem possible that he had never read the policy, which so plainly insures against total permanent disability. In the light of all the circumstances, his explanation is not credible.

The court below, after reviewing the evidence and the decisions of this and other courts, reached the conclusion that petitioner had not sustained the burden of proof and that the trial court was justified in directing a verdict for the government. That conclusion is well supported by our recent decision in the *Lumbra* case, *supra*, and by other decisions. See, e. g., *Proechel* v. *United States*, *supra*; *United States* v. *Thomas*, *supra*; *Hanagan* v. *United States*, 57 F. (2d) 860, 861.

Judgment affirmed.